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United States
Circuit Court of Appeals

For the Ninth Circuit.

GLADYS M. SHORES and HAROLD M. F.
BEHNEMAN,

Appellants,

vs.

HENDY REALIZATION CO., a corporation,
(formerly THE JOSHUA HENDY IRON
WORKS,) A. J. MAYMAN, C. B. MOORES,
E. PRICE, A. E. WEBBER and W. R. BAS-
SICK, individually and as the Directors of
Hendy Realization Co., ELMER M. HYLAND
and MORRIS LEVIT,

Appellees.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 494

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

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No. 10085

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Northern District of California, Southern
Division.

No. 21792-S

GLADYS M. SHORES,

Plaintiff,

vs.

HENDY REALIZATION CO., a corporation
(formerly The Joshua Hendy Iron Works),
A. J. MAYMAN, C. B. MOORES, E.
PRICE, A. E. WEBBER and W. R. BAS-
SICK, individually and as the Directors of
Hendy Realization Co., ELMER M. HY-
LAND, MORRIS LEVIT, FIRST DOE,
SECOND DOE and THIRD DOE,

Defendants.

RECORD ON REMOVAL [1*]

State of California,

City and County of San Francisco—ss.

I, H. A. van der Zee, County Clerk in and for the City and County of San Francisco, and ex officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify that the papers attached hereto consisting of:

Complaint;

Demurrer;

Notice of intention to file petition and bond for removal and of presentation of same to court for acceptance;

Petition for removal of cause to the Southern Division of the District Court of the United States for the Northern District of California;

Bond on removal;

constitute a full, true, and correct copy of the record of the within entitled action now on file in my office.

Dated: February 25, 1941.

(Seal)

H. A. VAN DER ZEE,

County Clerk and ex officio
Clerk of the Superior Court
in and for the City and
County of San Francisco,

By E. WALL, Deputy Clerk. [2]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of California,
in and for the City and County of San Francisco.

No. 299911

GLADYS M. SHORES,

Plaintiff,

vs.

HENDY REALIZATION CO., a corporation,
(formerly The Joshua Hendy Iron Works),
A. J. MAYMAN, C. B. MOORES, E.
PRICE, A. E. WEBBER and W. R. BAS-
SICK, individually and as the Directors of
Hendy Realization Co., ELMER M. HY-
LAND, MORRIS LEVIT, FIRST DOE,
SECOND DOE and THIRD DOE,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF;
FOR INJUNCTIVE RELIEF, AND FOR
CANCELLATION OF CERTAIN STOCK
CERTIFICATES.

The above named plaintiff complains of the above
named defendants, and each of them, and for cause
of action alleges:

I.

At all of the times herein mentioned, defendant
Hendy Realization Co. has been, and now is, a
corporation, duly organized and existing under and
by virtue of the laws of the State of California;
prior to on or about December 4, 1940, the name

of said corporation was The Joshua Hendy Iron Works, and it is hereinafter sometimes referred to as such; on or about said last mentioned date, said corporate name was, by amendment of the Articles of Incorporation of said company, changed to Hendy Realization [3] Co.; said company will hereinafter, for convenience, sometimes be referred to as the "Hendy Co."

II.

Plaintiff does not now know the true names of the defendants herein sued under the fictitious names of First Doe, Second Doe and Third Doe, but prays that when said true names are ascertained they may be inserted herein in place and stead of said fictitious names.

III.

Since on or about March 24, 1936, the above named defendants, Mayman, Moores, Price, Webber and Bassick, continuously have been, and now are, the duly appointed, qualified and acting Directors of the Hendy Co.; from on or about March 24, 1936, and continuously thereafter up to on or about November 15, 1940, the above named defendants, Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, were employees of Hendy Co. and as such were, during said period, fully compensated for services rendered to said corporation; plaintiff is informed and believes, and therefore alleges, that for said period commencing on or about March 24, 1936 and ending on or about

November 15, 1940, the said defendant Bassick was continuously the duly appointed, qualified and acting President and General Manager of Hendy Co.; plaintiff is further informed and believes, and therefore alleges, that none of said defendants Hyland, Levit, First Doe, Second Doe or Third Doe were officers of said corporation at any time during said last mentioned period.

IV.

Plaintiff is now, and continuously since March 24, 1936 has been, the owner of three hundred three and one-half (303½) shares of the capital stock of Hendy Co. [4]

V.

No demand has been made by plaintiff upon defendant Hendy Realization Co. to bring this action, for the reason that defendants Mayman, Price, Webber and Bassick constitute the entire Board of Directors of said corporate defendant, and, together with defendants Hyland, Levit, First Doe, Second Doe and Third Doe, are the persons against whom relief is herein sought; the making of demand upon said defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the defendant Hendy Co., would therefore be a useless and idle act; the Hendy Co. has accordingly been named as a party defendant herein, and this action is brought for and on behalf of said corporation and all stockholders thereof, other than defendants Bassick, Hyland, Levit, First Doe, Second Doe

and Third Doe, as the holders of the twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of said corporation distributed to them in the manner and under the circumstances set forth in Paragraph XV of this complaint.

VI.

On or about March 4, 1935, The Bank of California National Association, a corporation, Moore Dry Dock Company, a corporation, and Baker-Hamilton & Pacific Company, a corporation, as creditors of the Hendy Co., filed a joint petition in the United States District Court for the Northern District of California, Southern Division, for the corporate reorganization of said company under the provisions of Section 77B of the National Bankruptcy Act; on March 21, 1935, said United States District Court, being satisfied that said petition was properly filed and that the same complied in all respects with the provisions of said Section 77B of the Bankruptcy Act, entered its order approving said petition as properly filed under said Section [5] 77B; the proceedings thus commenced in said United States District Court were entitled "In the Matter of The Joshua Hendy Iron Works, a corporation, Debtor", and were numbered 25937-S in the records of said court.

VII.

On September 25, 1935, the above mentioned creditors of the Hendy Co. who filed the original petition for the corporate reorganization of said

company, as aforesaid, together with Albertie N. Hendy, a stockholder of said company, filed in said reorganization proceedings a proposed plan for the reorganization of said company; said Plan of Reorganization was thereafter fully and in all respects accepted by creditors and stockholders of the Hendy Co. whose interests were affected thereby, as required by the provisions of said Section 77B of the Bankruptcy Act, and on March 24, 1936, by order duly given and made by Hon. A. F. Sure, one of the judges of said United States District Court, said Plan of Reorganization was approved and confirmed, and the Hendy Co., as the debtor in said reorganization proceedings, was authorized, empowered and directed to forthwith reorganize and put into effect and carry out the provisions of said Plan of Reorganization and the orders of said United States District Court relative thereto.

VIII.

At the time of the approval by said United States District Court of said Plan of Reorganization, as aforesaid, there were forty-four hundred and twenty-five (4425) shares of the capital stock of the Hendy Co. outstanding, and the said company, as of July 31, 1935, had outstanding obligations, both secured and unsecured, amounting to approximately Six Hundred Twenty-three Thousand One Hundred and Seventy and 14/100ths Dollars (\$623,170.14); under the terms of said Plan of Reorganization, said obligations were reduced by

from ten per cent (10%) to [6] fifteen per cent (15%), depending upon their classification, and payment of all of said obligations was deferred for a period of five years; the total amount of said obligations, as reduced and deferred under said Plan, amounted to the sum of Five Hundred Forty-nine Thousand Three Hundred Seventeen and 04/100ths Dollars (\$549,317.04).

IX.

Paragraph 6G of said Plan of Reorganization provided as follows:

“G. Capital stock.

4425 shares of the capital stock of the debtor corporation are now outstanding, said shares having a book value of \$212,898.51, but no actual value.

In consideration of the extensions granted by the creditors and of the reduction of their claims in the sum of \$73,853.06, as aforesaid, the stockholders shall appropriately endorse and deliver the stock held by them to the Board of Directors of the debtor corporation, appointed as hereinafter provided, to be held by said Board as follows:

1. 50% of the shares so deposited by each stockholder shall be held in trust and voted by said Board for a period of 5 years, and thereafter until the extended obligations are fully paid, so as to leave the management of the debtor corporation

during such period in the hands of its creditors. The Board shall have full power to vote said stock, including the power to vote for a reorganization of the capital structure of the debtor corporation so as to provide, at any time, for an issue of one or more classes of preferred stock and the exchange therefor of any part or all of the unsecured liabilities of the debtor corporation. Upon the expiration of 5 years and the payment in full of the extended obligations, such shares shall be returned to their respective owners.

2. The remaining 50% of the shares so delivered by each stockholder shall be held by said Board free and clear of any claim, right, title or interest therein by such stockholder, to be distributed by said Board, in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company's affairs."

X.

Paragraph 8 of said Plan of Reorganization provided in [7] part as follows:

"8. Effect.

While this plan of reorganization will not expunge any of the liabilities of the debtor corporation by transferring them into capital, it will definitely postpone the payment of both

principal and interest on prereceivership obligations (excepting from proceeds of assets already allocated as security and therefore not available for working capital) for a sufficiently long period to give the new management an opportunity to resuscitate the debtor corporation, while at the same time the rate of interest is materially reduced. The mere deferment of payment does not, of course, satisfy either principal or interest; but it is manifest that the definite postponement of the payment of all interest and prereceivership liabilities for five years (so that, during such period, the debtor corporation will only be required to pay its current operating expenses, taxes, and the small balance of its receivership accounts), will afford the new management a reasonable opportunity for rehabilitation. If the affairs of the debtor corporation cannot be restored within this period, drastic measures, perhaps even abandonment, will be necessary. If, however, substantial progress is made, any necessary further funding should be readily accomplished.”

XI.

Immediately subsequent to the confirmation of said Plan of Reorganization by the said United States District Court on March 24, 1936, as aforesaid, and pursuant thereto, defendants Mayman, Moores, Price, Webber and Bassick became the Directors of the Hendy Co., and as such became

the Voting Trustees of the fifty per cent (50%) of the outstanding stock of said company which was retained by its stockholders under Paragraph 6G1 of said Plan, and as such Directors and Voting Trustees said defendants proceeded to carry the said Plan into effect; the affairs of the Hendy Co. ever since have been and now are conducted by, and the business of said company ever since has been and now is managed under the supervision of, said last named defendants, as such Directors.

XII.

Prior to, and at the time of, the confirmation of said Plan of Reorganization on March 24, 1936, as aforesaid, plaintiff [8] was the owner of six hundred and seven (607) shares of stock of The Joshua Hendy Iron Works; subsequent to said confirmation date, and pursuant to the provisions of Paragraph 6G of said Plan of Reorganization, plaintiff deposited her said six hundred and seven (607) shares with said defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of The Joshua Hendy Iron Works; upon such deposit there was executed between plaintiff and said last named defendants, in duplicate, a 'Trustees' Receipt and Certificate evidencing ownership by plaintiff thereafter of an aggregate of three hundred three and one-half ($303\frac{1}{2}$) shares, that is to say, fifty per cent (50%) of plaintiff's said original shareholdings, which shares were thereafter held by said last named defendants as such Directors

and Trustees, pursuant to the terms of Paragraph 6G1 of said Plan of Reorganization and said Trustees' Receipt and Certificate, up to December 21, 1940; the other fifty per cent (50%) of plaintiff's said original shareholdings, that is to say, three hundred three and one-half ($303\frac{1}{2}$) shares, which were deposited with defendants Mayman, Moores, Price, Webber and Bassick, as aforesaid, were thereafter held by said last mentioned defendants, as the Directors of the Hendy Co., pursuant to Paragraph 6G2 of said Plan, until on or about December 20, 1940, when they were disposed of in the manner described in Paragraph XV of this complaint.

XIII

On or about November 4, 1940, the Hendy Co. granted an option to MacDonald & Kahn, Inc., a corporation, for the sale of the Hendy Co.'s Sunnyvale, California, plant and equipment, which properties represented the principal and all operating assets of said company; on November 15, 1940, MacDonald & Kahn, Inc. exercised said option and purchased said properties for an amount which plaintiff is informed and believes, and therefore alleges, was slightly in excess of Four Hundred Thousand Dollars [9] (\$400,000), and plaintiff is further informed and believes, and therefore alleges, that said sale has been fully consummated; since its incorporation in 1906 the Hendy Co. has been, and continuously up to on or about November 15, 1940 was, engaged in the general foundry

and metal products manufacturing business, with the production department of its business being conducted entirely at said Sunnyvale plant; by reason of the sale of said principal and all of the operating assets of the company, i.e., the said Sunnyvale plant and equipment, the continuation of the company in the said business has now been rendered impossible.

XIV

Since the confirmation of said Plan of Reorganization of the Hendy Co. on March 24, 1936, no dividends have been paid or declared upon any of the outstanding stock of said company, and said company has not, at any time since said last mentioned date, been financially in a condition which would permit of the payment of such dividends; plaintiff is informed and believes, and therefore alleges, that on November 15, 1940, the date of the above mentioned sale of the principal and all operating capital assets of the Hendy Co. to MacDonald & Kahn, Inc., there still remained unpaid more than Two Hundred Thousand Dollars (\$200,000) of the Approximate Five Hundred Forty-nine Thousand Three Hundred Seventeen and 04/100ths Dollars (\$549,317.04) of reduced and deferred obligations of the Hendy Co. covered by said Plan of Reorganization; subsequent to November 15, 1940, all of said remaining Two Hundred Thousand Dollars (\$200,000) or more of reduced and deferred obligations covered by said Plan of Reorganization were fully paid, but plaintiff is informed and believes, and therefore alleges, that

in order to make such payment the above named defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the Hendy Co., were forced to, and did, resort to the moneys derived from the said sale of capital assets [10] of the Hendy Co. to MacDonald & Kahn, Inc.

XV.

Plaintiff is informed and believes, and therefore alleges, that shortly prior to December 20, 1940, the exact date being at this time unknown to plaintiff, and notwithstanding the matters hereinabove alleged, defendants Mayman, Moores, Price, Webber and Bassick, acting as the Board of Directors of the Hendy Co., and pursuant to Paragraph 6G2 of the said Plan of Reorganization of the Hendy Co., proceeded to distribute to defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe all of the twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of said company previously held by said Directors under said Paragraph 6G2 of said Plan, which twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares represent the fifty per cent (50%) of the stock of said company outstanding on March 24, 1936, and surrendered to defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the Hendy Co., by plaintiff and the other then stockholders of said company, pursuant to Paragraph 6G of said Plan of Reorganization; the exact proportions in which

said twenty-two hundred twelve and one-half (2212-1/2) shares of stock were distributed to said defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe is at this time unknown to plaintiff.

XVI.

On December 20, 1940, proceedings for the winding up and dissolution of the Hendy Co. were commenced by the adoption of a resolution by the vote of persons allegedly entitled to vote and holding shares representing fifty per cent (50%) or more of the voting power of all of the outstanding capital stock of said company, stating the election of the Hendy Co. and its stockholders to wind up its affairs and voluntarily dissolve; on or about [11] December 21, 1940, notice of the commencement of such dissolution proceedings was mailed by defendant Mayman, as Secretary of the Hendy Co., to plaintiff and all other stockholders and Voting Trustees' Receipt and Certificate holders of said company, which said notice was received by plaintiff on or about December 23, 1940.

XVII.

On December 21, 1940, at a duly and regularly called meeting of the Board of Directors of the Hendy Co., defendants Mayman, Moores, Price, Webber and Bassick, acting as the Directors of said company, proceeded to terminate the Voting Trust created by Paragraph 6G of said Plan of Reorganization of the Hendy Co. and to declare a first liqui-

dating dividend of Forty- five Dollars (\$45) per share in favor of plaintiff and the other holders of all of the then outstanding Trustees' Receipts and Certificates of the Hendy Co. issued pursuant to Paragraph 6G1 of said Plan of Reorganization; on said last mentioned date there were outstanding Trustees' Receipts and Certificates of the Hendy Co. evidencing ownership of a total of nineteen hundred seven and three-quarters ($1907\frac{3}{4}$) shares of the capital stock of said company, three hundred three and one-half ($303\frac{1}{2}$) of which then were, and now are, owned by plaintiff; in declaring said first liquidating dividend of Forty-five Dollars (\$45) per share, as aforesaid, defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the Hendy Co., specifically excluded from participation therein the twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of said company previously distributed by them to defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as aforesaid.

XVIII.

Defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the Hendy Co., contend that the affairs of said [12] company have been successfully rehabilitated, and in accordance with this contention have distributed to defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as the alleged managing officers of the Hendy Co., said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of the outstanding stock of said

company, pursuant to Paragraph 6G2 of said Plan of Reorganization, all as set forth in Paragraph XV of this complaint; by reason of such distribution of said stock to said defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, all defendants contend that defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as the owners of said stock, will be entitled to receive future liquidating dividends declared by the Hendy Co. upon an equal pro rata basis with plaintiff and the other stockholders of the Hendy Co. who, under the provisions of Paragraph 6G of said Plan, were required to surrender said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares to defendants Mayman, Moores, Price, Webber and Bassick, as aforesaid; and defendants Mayman, Moores, Price, Webber and Bassick, as Directors of the Hendy Co., have threatened to, and will unless restrained by an order of this court, cause future liquidating dividends declared by the Hendy Co. to be paid to said defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, upon said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares now collectively held by them, upon an equal pro rata basis with plaintiff and the other stockholders of the Hendy Co.; plaintiff is informed and believes, and therefore alleges, that there will hereafter be available for distribution by the Hendy Co. to its shareholders, as liquidating dividends, an amount in excess of Sixty Thousand Dollars (\$60,000), more than fifty per cent (50%) of which will be paid by defendants Mayman, Moores, Price Webber

and Bassick, as the Directors of [13] the Hendy Co., to defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, on said twenty-two hundred twelve and one-half (2212-1/2) shares now held by them, unless such payment is restrained by an order of this court; plaintiff contends that the term "successful rehabilitation", as used in Paragraph 6G2 of said Plan of Reorganization, contemplated full payment of the reduced and deferred obligations covered by said Plan out of earnings of the Hendy Co. derived from the operation of its business as a going concern, to the end that the capital assets thereof might be preserved for the benefit of the stockholders, and to the end that the control and management of the affairs of the company as a going concern might be ultimately returned to said stockholders; that said term "successful rehabilitation" as used in Paragraph 6G2 of said Plan did not contemplate payment of said reduced and deferred obligations, or any part thereof, out of proceeds of the sale of all operating capital assets and the corporate name and good will of the Hendy Co., followed by a winding up and dissolution of said company.

XIX.

By reason of the facts hereinabove set forth, plaintiff alleges that the affairs of the Hendy Co. have not been successfully, or at all, rehabilitated and that defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of said company, accordingly had no right or discretion in the matter

of distributing the said twenty-two hundred twelve and one-half (2212-1/2) shares of said company, or any of said shares, to defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as the alleged managing officers of said company, either pursuant to Paragraph 6G2 of said Plan of Reorganization, or otherwise, and that said share distribution was therefore illegal and void; and plaintiff, by reason of the facts hereinabove set forth, further [14] alleges that defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the Hendy Co., have no right to cause any liquidating dividends hereafter declared by the Hendy Co. in favor of its stockholders to be paid to said defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe on said twenty-two hundred twelve and one-half (2212-1/2) shares heretofore distributed to, and now collectively held by, them, as aforesaid, but that all such liquidating dividends should be declared only in favor of, and should only be paid to, plaintiff and the other owners and holders of the nineteen hundred seven and three-quarters (1907-3/4) shares of Hendy Co. stock which, from March 24, 1936 to December 21, 1940, were subject to the Voting Trust created by said Plan of Reorganization; an actual controversy has accordingly arisen as to the rights and duties of the parties hereto with respect to: (1) the provisions of Paragraph 6G2 of said Plan of reorganization; (2) the title to and disposition of the twenty-two hundred twelve and one-half (2212-1/2) shares

of stock of said company heretofore distributed to, and now held by, said defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as aforesaid; and (3) the future distribution of all liquidating dividends hereafter declared by the Hendy Co. in favor of its stockholders.

Wherefore, plaintiff prays as follows:

1. For a judgment declaring and determining the rights and duties of the parties hereto with respect to each other under Paragraph 6G of said Plan of Reorganization;

2. For a judgment declaring and determining the rights and duties of the parties hereto with respect to the disposition of the twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of the Hendy Co. heretofore distributed to, and now held by, defendants Bassick, Hyland, Levit, First Doe, Sec- [15] ond Doe and Third Doe under the circumstances hereinabove set forth;

3. For a judgment declaring and determining the rights and duties of the parties hereto with respect to the future distribution of all liquidating dividends hereafter declared by the Hendy Co. to its shareholders, and particularly with reference to whether any such liquidating dividends should be paid on said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of said company heretofore distributed to, and now held by, said defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as hereinabove set forth, or whether payment of all such future liquidating divi-

dends should be restricted to the nineteen hundred seven and three-quarters (1907-3/4) shares of stock of the Hendy Co. which, from March 24, 1936 to December 21, 1940, were subject to the Voting Trust created by Paragraph 6G1 of said Plan of Reorganization;

4. That defendants Mayman, Moores, Price, Webber and Bassick, and each of them, individually and as Directors of the Hendy Co., and their successors in office, and defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as the present holders of said twenty-two hundred twelve and one-half (2212-1/2) shares of stock of said company, be required to account for all of said twenty-two hundred twelve and one-half (2212-1/2) shares of stock, as well as for any and all liquidating dividends of the Hendy Co. that may be hereafter declared and paid on said twenty-two hundred twelve and one-half (2212-1/2) shares of stock;

5. That defendant Hendy Co. and defendants Mayman, Moores, Price, Webber and Bassick, and each of them, individually and as Directors of the Hendy Co., and their successors in office, and their agents, servants, employees, attorneys, and those [16] acting in aid or assistance of them, be permanently restrained and enjoined from declaring or causing to be declared, and from paying or causing to be paid from the assets of the Hendy Co., any liquidating or other dividends that may hereafter become due and payable to the stockholders of the Hendy Co., either by reason of the winding up and

dissolution of said company, or otherwise, to defendants Bassick and/or Hyland and/or Levit and/or First Doe and/or Second Doe and/or Third Doe, or to any other present or future holder of the, or any of the, twenty-two hundred twelve and one-half (2212-1/2) shares of stock of the Hendy Co. distributed to said last mentioned defendants by defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the Hendy Co., pursuant to Paragraph 6G2 of said Plan of Reorganization, as hereinabove set forth;

6. That the distribution of said twenty-two hundred twelve and one-half (2212-1/2) shares to defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, pursuant to Paragraph 6G2 of said Plan of Reorganization, be declared illegal and void, and that said last mentioned defendants, and each of them, and/or their successors in interest, or the successor in interest of any of them, be required by an order of this court to surrender to the Hendy Co. any shares of said company now held by them, or any of them, and which form any part of said twenty-two hundred twelve and one-half (2212-1/2) shares distributed to said last mentioned defendants, pursuant to Paragraph 6G2 of said Plan of Reorganization, as hereinabove set forth, and that following such surrender defendants Mayman, Moores, Price, Webber and Bassick, and each of them, as the Directors of the Hendy Co., be required by an order of this court to cancel all of the certificates evidencing said twenty-two hundred

twelve and one-half (2212-1/2) shares and to retire [17] the same to the treasury of the Hendy Co.;

7. That plaintiff be allowed her costs of suit incurred herein; and

8. That plaintiff be granted such other and further relief as to the court may seem just, proper and equitable in the premises.

BYRNE, LAMSON & JORDAN
Attorneys for Plaintiff [18]

State of California,
County of San Diego—ss:

Gladys M. Shores, being first duly sworn, deposes and says:

That she is the plaintiff named in the foregoing complaint; that she has read said complaint and knows the contents thereof; that the same is true of her own knowledge except as to the matters which are therein stated on her information or belief, and as to those matters that she believes it to be true.

GLADYS M. SHORES

Subscribed and sworn to before me this 15th day of January, 1941.

(Seal) LENA A. TRADER

Notary Public in and for the County of San Diego,
State of California.

My commission expires Sept. 20, 1943.

[Endorsed]: Filed Jan. 17, 1941. H. A. van der Zee. By D. T. Wood, Deputy Clerk. [19]

In the Superior Court of the State of California,
in and for the City and County of San Francisco.

No. 299911

GLADYS M. SHORES,

Plaintiff,

vs.

HENDY REALIZATION CO., a corporation (formerly The Joshua Hendy Iron Works), A. J. MAYMAN, C. B. MOORES, E. PRICE, A. E. WEBBER and W. R. BASSICK, individually and as the Directors of Hendy Realization Co., ELMER M. HYLAND, MORRIS LEVIT, FIRST DOE, SECOND DOE and THIRD DOE,

Defendants.

DEMURRER TO COMPLAINT

Comes now Hendy Realization Co., a corporation (formerly The Joshua Hendy Iron Works), A. J. Mayman, C. B. Moores, E. Price, A. E. Webber and W. R. Bassick, individually and as the Directors of Hendy Realization Co., Elmer M. Hyland, and Morris Levit, defendants in the above entitled action, and demur to the complaint on file herein, and for grounds of demurrer specify:

I.

Said complaint does not state facts sufficient to constitute a cause of action against said defendants, or any of them.

II.

The above entitled court has no jurisdiction of the subject matter of the action.

III.

The above entitled court has no jurisdiction of the persons of the defendants, or any of them. [20]

IV.

There is a defect of parties plaintiff, in that plaintiff alleges in said complaint that said action is brought for and on behalf of all the stockholders of defendant Hendy Realization Co., but said stockholders have not been joined as parties plaintiff or defendant, nor has any excuse for their nonjoinder been alleged.

V.

There is another action pending between the same parties for the same cause.

VI.

Said complaint is ambiguous in the following particulars:

(a) It is alleged in paragraph III that certain defendants were employees of defendant Hendy Realization Co., during a certain period of time. "and as such were, during said period, fully compensated for services rendered to said corporation"; but it cannot be ascertained from said complaint when or in what manner said defendants were compensated, nor in what such alleged compen-

sation consisted, nor whether such alleged compensation was "full" compensation in relation to contracts of employment or in relation to the reasonable value of said services;

(b) It is alleged in paragraph V that the making of a demand upon defendants Mayman, Moores, Price, Webber, and Bassick, that defendant Hendy Realization Co. bring this action, would be "a useless and idle act"; but it cannot be ascertained from said complaint why this is so, the complaint merely alleging in this connection that said defendants constitute the entire board of directors of said defendant corporation and are "the persons against whom relief is herein sought"; [21]

(c) It is alleged in paragraph XVI that a certain resolution relating to dissolution of defendant corporation was passed "by the vote of persons allegedly entitled to vote" a majority of the outstanding capital stock; but it cannot be ascertained from said complaint which "persons" are referred to, why they were only "allegedly" entitled to vote, and whether it is plaintiff's contention that they were not entitled to vote at all, or entitled to vote only in some other way;

(d) It is alleged in paragraph XVIII that defendants Mayman, Moores, Price, Webber, and Bassick, as directors of defendant corporation "contend that the affairs of said company have been successfully rehabilitated"; but it cannot be ascertained from said complaint when or how such "contention" was made or is evidenced;

(e) It is alleged in paragraph XVIII that defendants Bassick, Hyland, and Levit, are “the alleged managing officers of the Hendy Co.”; but it cannot be ascertained from said complaint by whom such allegation was made, or whether it is plaintiff’s contention that said defendants were not such managing officers;

(f) It is alleged in paragraph XVIII that all defendants “contend” that certain defendants will be entitled to receive future liquidating dividends; but it cannot be ascertained from said complaint when or how such “contention” was made or is evidenced;

(g) It is alleged in paragraph XIX “that the affairs of the Hendy Co. have not been successfully, or at all, rehabilitated,” during the period from March 24, 1936, to December 20, 1940; but it cannot be ascertained from said complaint what the net worth of said defendant corporation was on or prior to March 24, 1936, or what the value of the [22] capital stock was on or prior to said date.

VII.

Said complaint is unintelligible in the same particulars as to which it is ambiguous.

VIII.

Said complaint is uncertain in the same particulars as to which it is ambiguous and unintelligible.

Wherefore, said defendants pray that their demurrer be sustained and that plaintiff takes nothing by her complaint.

Dated: January 27, 1941.

KENNETH FERGUSON

BERT W. LEVIT

PILLSBURY, MADISON & SUTRO

GERALD S. LEVIN

Attorneys for Defendants Hendy Realization Co., a corporation (formerly The Joshua Hendy Iron Works), A. J. Mayman, C. B. Moores, E. Price, A. E. Webber and W. R. Bassick, individually and as the directors of Hendy Realization Co., Elmer M. Hyland, and Morris Levit.

Code of Civil Procedure of the State of
California, section 430. [23]

In the Superior Court of the State of California,
in and for the City and County of San Francisco.

No. 299911

GLADYS M. SHORES,

Plaintiff,

vs.

HENDY REALIZATION CO., a corporation, (formerly The Joshua Hendy Iron Works,) A. J. MAYMAN, C. B. MOORES, E. PRICE, A. E. WEBBER and W. R. BASSICK, individually and as the Directors of Hendy Realization Co., ELMER M. HYLAND, MORRIS LEVIT, FIRST DOE, SECOND DOE and THIRD DOE,

Defendants.

NOTICE OF INTENTION TO FILE PETITION AND BOND FOR REMOVAL AND OF PRESENTATION OF SAME TO COURT FOR ACCEPTANCE.

To plaintiff above named, and to Messrs. Byrne, Lamson & Jordan, her attorneys:

You and each of you will please take notice that Hendy Realization Co., a corporation (formerly The Joshua Hendy Iron Works), A. J. Mayman, C. B. Moores, E. Price, A. E. Webber and W. R. Bassick, individually and as the Directors of Hendy [24] Realization Co., Elmer M. Hyland, and Morris Levit, defendants in the above entitled action, will, on Monday, January 27, 1941, file with the Clerk of the above entitled court a petition and bond for the removal of the above entitled cause from the Superior Court of the State of California, in and for the City and County of San Francisco, to the Southern Division of the District Court of the United States for the Northern District of California, and that said defendants will thereafter at the hour of two o'clock P. M., of said day, or as soon thereafter as counsel can be heard, present said petition and bond to the Honorable, the above entitled court, at the courtroom of Department 3 thereof, in the City Hall of the City and County of San Francisco, State of California, and at said time and place ask said Honorable Court for an order accepting said petition and bond and removing said cause to the Southern Division of the District Court of the United States for the Northern District of Cali-

fornia, as prayed for in said petition, a copy of which said petition, together with a copy of the bond therein referred to, is attached hereto and served herewith.

Dated: January 25, 1941.

KENNETH FERGUSON

BERT W. LEVIT

PILLSBURY, MADISON & SUTRO

GERALD S. LEVIN

Attorneys for Defendants Hendy Realization Co., a corporation (formerly The Joshua Hendy Iron Works), A. J. Mayman, C. B. Moores, E. Price, A. E. Webber and W. R. Bassick, individually and as the Directors of Hendy Realization Co., Elmer M. Hyland, and Morris Levit.

[Endorsed]: Filed Jan. 27, 1941. H. A. van der Zee, Clerk. By E. Wall, Deputy Clerk. [25]

In the Superior Court of the State of California,
in and for the City and County of San Francisco.

No. 299911

GLADYS M. SHORES,

Plaintiff,

vs.

HENDY REALIZATION CO., a corporation (formerly The Joshua Hendy Iron Works), A. J. MAYMAN, C. B. MOORES, E. PRICE, A. E. WEBBER and W. R. BASSICK, individually and as the Directors of Hendy Realization Co., ELMER M. HYLAND, MORRIS LEVIT, FIRST DOE, SECOND DOE and THIRD DOE,

Defendants.

PETITION FOR REMOVAL OF CAUSE TO
THE SOUTHERN DIVISION OF THE
DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

To the Honorable the Superior Court of the State
of California, in and for the City and County
of San Francisco:

Your petitioners Hendy Realization Co., a corporation (formerly The Joshua Hendy Iron Works), A. J. Mayman, G. B. Moores, E. Price, A. E. Webber and W. R. Bassick, individually and as the Directors of Hendy Realization Co., Elmer M. Hyland, and Morris Levit, appearing specially herein

for the sole purpose of [26] petitioning for the removal of the above entitled cause to the Southern Division of the District Court of the United States for the Northern District of California, respectfully shows to this Honorable Court:

1. Your petitioners are the defendants named in the above entitled suit which has heretofore been brought in this court and is now pending herein.

2. The complaint was filed and summons was issued in said suit on January 17, 1941, and the time has not elapsed within which your petitioner is required by the laws of the State of California, or the rules of this court, to answer or plead to said complaint.

3. Said suit is of a civil nature in equity and for declaratory relief, and is one of which the district courts of the United States are given original jurisdiction. The suit was brought for the purpose of recovering a judgment against the defendants decreeing and determining the rights and duties of the parties to the action with respect to each other in regard to the distribution of 2212½ shares of stock of the defendant Hendy Realization Co., and payment of liquidating dividends thereon, pursuant to paragraph 6G of the plan of reorganization in the Matter of The Joshua Hendy Iron Works (a corporation), Debtor. No. 25,937-S, in the United States District Court, Northern District of California, Southern Division, which said plan was confirmed by said United States District Court, on March 24, 1936; for an accounting from the afore-

named individual defendants in regard to the distribution of said 2212½ shares of stock of defendant Hendy Realization Co., and liquidating dividends that may be declared and paid thereon hereafter; for an injunction against said individual defendants from paying or causing to be [27] paid from the assets of said defendant Hendy Realization Co., any liquidating or other dividends that may hereafter become due and payable to the shareholders of said defendant Hendy Realization Co., to the present or future holders of said 2212½ shares of stock of said defendant Hendy Realization Co., pursuant to paragraph 6G of the plan of reorganization referred to above; for a declaration that the distribution of said 2212½ shares of stock pursuant to paragraph 6G of the plan of reorganization referred to above is illegal and void and that the holders thereof, defendants herein, be required by an order of this court to surrender to said defendant Hendy Realization Co., said shares of stock and that the individual defendants be required by an order of this court to cancel all the certificates evidencing said shares of stock and to retire the same to the treasury of said corporation.

4. Said suit is one arising out of the laws of the United States in that it involves a federal question, to wit: The validity, effect and enforcement of the decree of said United States District Court in the proceeding referred to above brought pursuant to the provisions of sections 77A and 77B of the Act entitled "An Act to Establish a Uniform System

of Bankruptcy Throughout the United States," approved July 1, 1898, and Acts amendatory thereof and supplementary thereto, hereinafter more generally referred to as the "Bankruptcy Act," approving and confirming the plan of reorganization of The Joshua Hendy Iron Works (a corporation), debtor, and ordering reorganization of said debtor in accordance with the provisions of said plan of reorganization, and furthermore, ordering the new board of directors of said debtor constituted in accordance with paragraph 7 of said plan of reorganization to receive from the shareholders of said debtor, [28] and hold and distribute the stock of said debtor as provided in paragraph 6G of said plan of reorganization.

5. The value of the matter or amount in controversy in said suit exceeds, exclusive of interest and costs, the sum of \$3,000, as more fully appears from the allegations of said complaint, to which your petitioners refer for further particularity without in any way admitting the truth of any of said allegations.

6. Your petitioners have made and filed herein their bond, with good and sufficient surety, that they will, within 30 days from the date of the filing of this petition, enter in the Southern Division of the District Court of the United States for the Northern District of California, a certified copy of the record in this suit, and for special bail, should any have been required, and for the payment of all costs that may be awarded by said District Court if

said District Court shall hold that said suit was wrongfully or improperly removed thereto.

7. Your petitioners desire to remove said cause to the Southern Division of the District Court of the United States for the Northern District of California.

Your petitioners therefore pray that their petition and bond be accepted by this court and that said suit be removed to said District Court pursuant to the statute in such cases made and provided, and that a transcript of the record herein be made and certified as provided by law, and that this court proceed no further in this suit. [29]

And your petitioner will ever pray.

KENNETH FERGUSON

BERT W. LEVIT

PILLSBURY, MADISON & SUTRO

GERALD S. LEVIN

Attorneys for Defendants Hendy Realization Co., a corporation (formerly The Joshua Hendy Iron Works), A. J. Mayman, C. B. Moores, E. Price, A. E. Webber and W. R. Bassick, individually and as the Directors of Hendy Realization Co., Elmer M. Hyland, and Morris Levit. [30]

State of California,

City and County of San Francisco—ss:

A. J. Mayman, being first duly sworn, deposes and says: That he is an officer, to wit, secretary of Hendy Realization Co., a corporation, one of the defendants named in the foregoing petition for re-

moval, and makes this affidavit for and on behalf of said corporation; that he has read the foregoing petition for removal and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information or belief, and as to those matters that he believes it to be true.

A. J. MAYMAN.

Subscribed and sworn to before me this 25th day of January, 1941.

(Seal)

LILLIAN RALSTON

Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires December 22, 1944.

[Endorsed]: Filed Jan. 27, 1941. H. A. van der
Zee, Clerk. By E. Wall, Deputy Clerk. [31]

In the Superior Court of the State of California,
in and for the City and County of San Francisco.

No. 299911

GLADY M. SHORES,

Plaintiff,

vs.

HENDY REALIZATION CO., a corporation
(formerly The Joshua Hendy Iron Works),
A. J. MAYMAN, C. B. MOORES, E.
PRICE, A. E. WEBBER and W. R. BAS-
SICK, individually and as the Directors of
Hendy Realization Co., ELMER M. HY-
LAND, MORRIS LEVIT, FIRST DOE,
SECOND DOE and THIRD DOE,

Defendants.

BOND ON REMOVAL

Know All Men by These Presents:

That Hendy Realization Co., a corporation (formerly The Joshua Hendy Iron Works), A. J. Mayman, C. B. Moores, E. Price, A. E. Webber, and W. R. Bassick, individually and as the Directors of Hendy Realization Co., Elmer M. Hyland and Morris Levit, as Principals, and Pacific Indemnity Company, a corporation organized for the purpose, among others, of becoming surety upon bonds and [32] undertakings, as Surety, parties of the first part, are held and firmly bound unto Gladys M. Shores, party of the second part, in the sum of

five hundred dollars (\$500), lawful money of the United States, for the payment whereof well and truly to be made unto the party of the second part, her heirs and assigns, the parties of the first part bind themselves, their successors and assigns, jointly and severally by these presents.

Nevertheless upon these conditions: That the said Principals, having filed or being about to file, their petition in the Superior Court of the State of California, in and for the City and County of San Francisco, praying for the removal of a certain cause therein pending, as above entitled, wherein the party of the second part is plaintiff, and the said Principals are defendants, to the Southern Division of the District Court of the United States for the Northern District of California:

Now, Therefore, if the said Principals shall enter in the said District Court of the United States, within thirty (30) days from the date of filing their said petition for removal, a certified copy of the record in said action, and also shall appear therein and enter special bail in said action if special bail was originally requisite therein, and shall well and truly pay all costs that may be awarded by the said District Court if said District Court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, the said Hendy Realization Co., a corporation (formerly The Joshua Hendy

Iron Works), A. J. Mayman, C. B. Moores, E. Price, A. E. Webber and W. R. Bassick, individually and as the Directors of Hendy Realization Co., Elmer M. Hyland and [33] Morris Levit, and the said Pacific Indemnity Company, a corporation, have caused these presents to be executed this 24th day of January, 1941.

HENDY REALIZATION CO.,

By A. J. MAYMAN

Secretary.

A. J. MAYMAN

E. PRICE

MORRIS LEVIT

W. R. BASSICK

ALFRED E. WEBBER

By HOPE R. WEBBER,

Attorney in Fact

ELMER M. HYLAND

C. B. MOORES

PACIFIC INDEMNITY
COMPANY,

By P. R. POULTON

Attorney in Fact

And

Attorney in Fact.

Approved: January 27, 1941.

THOS. M. FOLEY,

Judge of the Superior Court.

State of California,
City & County of San Francisco—ss.

One this 24th day of January in the year one thousand nine hundred and forty-one before me, Emily K. McCorry a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared P. R. Poulton known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed in the within instrument as the Attorney-in-Fact of said Company, and the said P. R. Poulton acknowledged to me that he subscribed the name of Pacific Indemnity Company, thereto as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Seal) EMILY K. McCORRY,
Notary Public in and for the City and County
of San Francisco, State of California.

My Commission expires December 30, 1942.

[Endorsed]: Filed Feb. 25, 1941. [34]

In the District Court of the United States, in and
for the Northern District of California, South-
ern Division.

No. 21792-S

GLADYS M. SHORES,

Plaintiff,

vs.

HENDY REALIZATION CO., a corporation
(formerly The Joshua Hendy Iron Works),
A. J. MAYMAN, C. B. MOORES, E.
PRICE, A. E. WEBBER and W. R. BAS-
SICK, individually and as the Directors of
Hendy Realization Co., ELMER M. HY-
LAND, MORRIS LEVIT, FIRST DOE,
SECOND DOE and THIRD DOE,
Defendants.

MOTION TO DISMISS ACTION AND FOR
MORE DEFINITE STATEMENT.

The defendants above named move the Court as
follows:

I.

To dismiss the action because the complaint fails
to state a claim against defendants or any of them
upon which relief can be granted.

II.

To require a more definite statement of the fol-
lowing matters, which are not averred with suf-
ficient definiteness or particularity to enable de-

fendants properly to answer or to prepare [35] for trial:

(a) It is alleged in paragraph III that certain defendants were employees of defendant Hendy Co. during a certain period of time, "and as such were, during said period, fully compensated for services rendered to said corporation"; but it cannot be ascertained from said complaint when or in what manner said defendants were compensated, nor in what such alleged compensation consisted, nor whether such alleged compensation was "full" compensation in relation to contracts of employment or in relation to the reasonable value of said services;

(b) It is alleged in paragraph V that the making of a demand upon defendants Mayman, Moores, Price, Webber, and Bassick that defendant Hendy Co. bring this action, would be "a useless and idle act"; but it cannot be ascertained from said complaint why this is so, the complaint merely alleging in this connection that said defendants constitute the entire Board of Directors of said defendant corporation and are "the persons against whom relief is herein sought";

(c) It is alleged in paragraph XVI that a certain resolution relating to dissolution of defendant corporation was passed "by the vote of persons allegedly entitled to vote" a majority of the outstanding capital stock; but it cannot be ascertained from said complaint which "persons" are referred to, why they were only "allegedly" en-

titled to vote, and whether it is plaintiff's contention that they were not entitled to vote at all, or entitled to vote only in some other way;

(d) It is alleged in paragraph XVIII that defendants Mayman, Moores, Price, Webber, and Bassick, as Directors of defendant corporation, "contend that the affairs of said company have been successfully rehabilitated"; but it cannot be ascertained from said complaint when or how such "contention" was made or is evidenced; [36]

(e) It is alleged in paragraph XVIII that defendants Bassick, Hyland, and Levit are "the alleged managing officers of the Hendy Co."; but it cannot be ascertained from said complaint by whom such allegation was made, or whether it is plaintiff's contention that said defendants were not such managing officers;

(f) It is alleged in paragraph XVIII that all defendants "contend" that certain defendants will be entitled to receive future liquidating dividends; but it cannot be ascertained from said complaint when or how such "contention" was made or is evidenced;

(g) It is alleged in paragraph XIX "that the affairs of the Hendy Co. have not been successfully, or at all, rehabilitated", during the period from March 24, 1936, to December 20, 1940; but it cannot be ascertained from said complaint upon what facts, if any, plaintiff bases such assertion, nor can it be ascertained therefrom what the net worth of said defendant corporation was on or prior to March

24, 1936, or what the value of the capital stock was on or prior to said date;

(h) It is alleged in paragraph V that said action is brought for and on behalf of all the stockholders of defendant, Hendy Co.; but it cannot be ascertained from said complaint why said stockholders have not been joined as parties plaintiff or defendant, nor has any reason or excuse for their non-joinder been alleged.

PILLSBURY, MADISON & SUTRO
STANLEY PEDDER and
KENNETH FERGUSON
LONG & LEVIT

Attorneys for Defendants. [37]

NOTICE OF MOTION

To Messrs. Byrne, Lamson & Jordan, attorneys for plaintiff:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the court room thereof, Department of the Honorable A. F. St. Sure, United States Post Office Building, San Francisco, California, on the 17th day of March, 1941, at ten o'clock A. M. of that day, or as soon thereafter as counsel can be heard.

In support of said motion, the undersigned cite the following:

Rules of Civil Procedure, Rule 12 (b), (e).

Dated: San Francisco, California, February 28th,
1941.

PILLSBURY, MADISON & SUTRO
STANLEY PEDDER and
KENNETH FERGUSON
LONG & LEVIT

Attorneys for Defendants.

Receipt of a copy of the foregoing Motion to
Dismiss Action and For More Definite Statement
and Notice of Motion is hereby admitted this 1st
day of March, 1941.

BYRNE, LAMSON & JORDAN
By PAUL S. JORDAN

Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 1, 1941. [38]

[Title of District Court and Cause—No. 21792-S.]

MOTION TO REMAND SUIT TO THE SUPE-
RIOR COURT OF THE STATE OF CALI-
FORNIA, IN AND FOR THE CITY AND
COUNTY OF SAN FRANCISCO

To the Honorable A. F. St. Sure, one of the judges
of the above entitled court:

The above named plaintiff hereby moves the
Honorable, the above entitled court, to remand the
above entitled suit to the Superior Court of the
State of California, in and for the City and County
of San Francisco.

This motion is made upon the following grounds, namely:

1. That this court has no jurisdiction over the subject matter of this action, or over the person of plaintiff;

2. That the record now before this court in this suit fails to disclose any dispute or controversy which depends upon the construction of the Constitution or laws of the [39] United States, and that this was, and is, defendants' sole ground for removal to this court from said Superior Court of the State of California, in and for the City and County of San Francisco;

3. That the said suit is not one arising under the Constitution or laws of the United States;

4. That this suit is not one within the original and exclusive jurisdiction of this court, and that jurisdiction thereof has already attached in said Superior Court.

This motion is based upon the certified transcript of the record in this suit on file herein, upon the accompanying notice of motion, and upon all of the records, papers and files herein.

Dated: March 12th, 1941.

BYRNE, LAMSON & JORDAN
PAUL S. JORDAN

Attorneys for Plaintiff

[Endorsed]: Filed Mar. 12, 1941. [40]

District Court of the United States
Northern District of California
Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 24th day of March, in the year of our Lord one thousand nine hundred and forty-one.

Present: the Honorable A. F. St. Sure, District Judge.

[Title of Cause—No. 21792-S Civil.]

Paul S. Jordan, Esq., appearing as attorney for plaintiff, and Gerald Levin, Esq., appearing as attorney for defendant. The motion to remand was argued and submitted, and after due consideration had thereon, Ordered motion to remand denied. Upon motion of Mr. Levin, with consent of Mr. Jordan, the hearing on the motion to dismiss and motion for more definite statement was Ordered continued to March 31st, 1941. [41]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern

District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 7th day of April, in the year of our Lord one thousand nine hundred and forty-one.

Present: the Honorable A. F. St. Sure,
District Judge.

[Title of Cause—No. 21792-S Civil.]

Paul S. Jordan, Esq., appearing as attorney for plaintiff, and Kenneth Ferguson, Esq., appearing as attorney for defendant. After hearing the attorneys, it is Ordered that the motion to dismiss and the motion for more definite statement each be denied. Defendant allowed ten (10) days to answer. It was stipulated between the parties that all matters relating to the motion to stay proceedings in Bankruptcy case No. 25937, In the Matter of Joshua Hendy Iron Works, etc., Debtor, and this action are now before the Court and should be consolidated for hearing. It is ordered that said stipulation be approved. [42]

In the United States District Court,
Northern District of California,
Southern Division.

No. 25937-S

In the matter of THE JOSHUA HENDY IRON
WORKS (whose name has been changed to
HENDY REALIZATION CO.), a corporation,
Debtor.

HENDY REALIZATION CO., (formerly THE
JOSHUA HENDY IRON WORKS), a corpo-
ration, et al.,

Petitioners,

vs.

HAROLD M. F. BEHNEMAN and GLADYS M.
SHORES,

Respondents.

No. 21792-S

GLADYS M. SHORES,

Plaintiff,

vs.

HENDY REALIZATION CO., a corporation,
et al.,

Defendants.

ORDER CONSOLIDATING CAUSES FOR
TRIAL [43]

It Is Hereby Ordered and Decreed, upon this
court's motion, that the cause entitled "Gladys M.

Shores, plaintiff, v. Hendy Realization Co., a corporation, et al., defendants," now pending before this court and numbered 21792-S herein be, and it is hereby, consolidated for trial in this court with the cause entitled "In the matter of The Joshua Hendy Iron Works (whose name has been changed to Hendy Realization Co., a corporation, debtor; Hendy Realization Co., a corporation, et al., petitioners, v. Harold M. F. Behneman and Gladys M. Shores, respondents), now pending before this court and numbered 25937-S herein, and that said causes so consolidated shall be tried before this court at the same time.

And It Is Further Ordered, Adjudged, and Decreed that the defendants in said cause No. 21792-S be, and they are hereby, granted ten (10) days from the date of this Order within which to plead on the merits to the complaint of the plaintiff in said cause; and respondents in said cause No. 25937-S be, and they are hereby, granted ten (10) days from the date of this Order within which to plead on the merits to the petitions of Hendy Realization Co., et al., in said cause.

Dated: April 11th, 1941.

A. F. ST. SURE,

Judge of the District Court.

[Endorsed]: Filed Apr. 11, 1941. [44]

[Title of District Court and Cause—No. 21792-S.]

ANSWER

Come now Hendy Realization Co., a corporation (formerly The Joshua Hendy Iron Works), Elmer M. Hyland, Morris Levit, and A. J. Mayman, C. B. Moores, E. Price, and W. R. Bassick, sued individually and as the Directors of Hendy Realization Co., defendants above named, and, pursuant to Order of the above entitled court, answering the complaint on file herein, admit, deny, and allege as follows: [45]

I.

Answering the allegations of Paragraph I of said complaint, deny that the date of the change of the name of The Joshua Hendy Iron Works to Hendy Realization Co., was on or about December 4, 1940, and in such connection allege that the date of such change of corporate name was December 2, 1940.

II.

Defendants have no information or belief sufficient to enable them to answer the allegations of Paragraph II of said complaint, and basing their denial on that ground deny generally and specifically, each and every, all and singular, said allegations.

III.

Answering the allegations of Paragraph III of said complaint, admit that from on or about March 24, 1936, and up to November 15, 1940, defendants Bassick, Hyland, and Levit were employees of

Hendy Realization Co., but defendants have no information or belief sufficient to enable them to answer the allegation that defendants First Doe, Second Doe, and Third Doe were employees of Hendy Realization Co., and basing their denial on said ground deny generally and specifically, each and every, all and singular, said allegation; and deny generally and specifically, each and every, all and singular, each and every other allegation contained in said Paragraph III. Allege that, by reason of the regular election of their successors in office, defendants A. J. Mayman, E. Price, and W. R. Bassick, on March 17, 1941, ceased to be, and are not now, Directors of defendant Hendy Realization Co.

IV.

Deny generally and specifically, each and every, all and singular, the allegations of Paragraph IV of said complaint.

V.

Admit that no demand has been made by plaintiff upon defendant Hendy Realization Co. to bring the above entitled action; [46] and deny generally and specifically, each and every, all and singular, each and every other allegation contained in Paragraph V of said complaint.

VI.

Answering the allegations of Paragraph VIII of said complaint, deny that under the terms of the plan of reorganization therein referred to the payment of the outstanding obligations of Hendy

Realization Co. was deferred for a period of five years.

VII.

Deny each and every, generally and specifically, all and singular, the allegations of Paragraph XI of said complaint.

VIII.

Answering the allegations of Paragraph XII of said complaint, defendants have no information or belief sufficient to enable them to answer the allegation that prior to and at the time of the confirmation of said plan of reorganization on March 24, 1936, plaintiff was the owner of 607 shares of the capital stock of The Joshua Hendy Iron Works, and, basing their denial upon said ground, deny generally and specifically, each and every, all and singular, said allegation; and deny generally and specifically, each and every, all and singular, each and every other allegation contained in said Paragraph XII.

IX.

Answering the allegations of Paragraph XIII of said complaint, defendants deny generally and specifically, each and every, all and singular, the allegations that on November 15, 1940, MacDonald & Kahn, Inc., exercised the option in said Paragraph referred to and purchased the properties in said Paragraph referred to for an amount slightly in excess of \$400,000.00 and/or any other sum and/or that said sale of said properties has been fully consummated to MacDonald & Kahn, Inc., or otherwise, or at all. [47]

X.

Answering the allegations of Paragraph XIV of said complaint, defendants admit that on November 15, 1940, there still remained unpaid more than \$200,000.00 of obligations of Hendy Realization Co. covered by said plan of reorganization, and that subsequent to November 15, 1940, said obligations were paid; but deny generally and specifically, each and every, all and singular, each and every other allegation contained in said Paragraph XIV.

XI.

Deny generally and specifically, each and every, all and singular, the allegations of Paragraph XV of said complaint.

XII.

Answering the allegations of Paragraph XVI of said complaint, defendants allege that the proceedings for the winding up and dissolution of Hendy Realization Co. were duly and regularly commenced, taken, and had, and deny generally and specifically, each and every, all and singular, any allegations in said Paragraph XVI inconsistent with this allegation; defendants have no information or belief sufficient to enable them to answer the allegation as to the date that the notice in said Paragraph referred to was received by plaintiff, and, basing their denial on said ground, deny said allegation.

XIII.

Answering the allegations of Paragraph XVII of said complaint, deny that in connection with

the termination of the voting trust created by Paragraph 6-G of said plan of reorganization, in said Paragraph referred to, defendants Mayman, Moores, Price, Webber, and Bassick were acting as the Directors of Hendy Realization Co., and/or acting wholly in said capacity; defendants have no information or belief sufficient to enable them to answer the allegation that 303½ shares of the capital stock of Hendy Realization Co. were and now are owned by plaintiff and, basing their [48] denial on said ground, deny generally and specifically, each and every, all and singular, said allegation; and deny that the 2212½ shares of stock of Hendy Realization Co. referred to in said Paragraph were distributed to defendants Bassick, Hyland, Levit, First Doe, Second Doe, and Third Doe as therein set forth.

XIV.

Answering the allegations of Paragraph XVIII of said complaint, defendants admit that they contend that 2212½ shares of the stock of defendant Hendy Realization Co. were distributed to its managing officers pursuant to the confirmed plan of reorganization (in said complaint referred to) as a reward for management and the successful rehabilitation of said corporation's affairs, and in such connection allege that said corporation's affairs were at the time of the distribution of said stock successfully rehabilitated; and defendants deny generally and specifically, each and every, all and singular, each and every other allegation contained in said Paragraph XVIII.

XV.

Deny generally and specifically, each and every, all and singular, the allegations of Paragraph XIX of said complaint.

And as and for a second, separate, and further defense to said complaint, defendants allege as follows:

I.

That plaintiff's said complaint fails to state a claim against defendants, or any of them, upon which relief can be granted.

Wherefore, defendants, and each of them, pray that plaintiff take nothing by reason of her said complaint; that defendants, and each of them, be hence dismissed with their costs of suit herein incurred; and for such other and further relief as is meet [49] and proper in the premises.

STANLEY PEDDER AND
KENNETH FERGUSON
PILLSBURY, MADISON &
SUTRO
LONG & LEVIT

Attorneys for Defendants [50]

State of California,
City and County of San Francisco—ss.

C. B. Moore, being first duly sworn, deposes and says:

That he is an officer, to-wit, the Vice-President, of Hendy Realization Co., a corporation (formerly The Jushua Hendy Iron Works), one of the de-

endants in the above entitled action, and as such is authorized to make this verification on behalf of said corporation; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to such matters therein stated on information or belief, and as to those matters he believes the same to be true.

C. B. MOORES

Subscribed and sworn to before me this 21st day of April, 1941.

LILLIAN RALSTON

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires December 22, 1944.

Receipt of Service

[Endorsed]: Filed Apr. 21, 1941. [51]

[Title of District Court and Cause.—No. 21792-S.]

STIPULATION

It appearing that A. E. Webber, one of the defendants above named, has been, by Order of the above entitled court given and made on April 11, 1941, directed, together with the other defendants, to plead on the merits to the complaint on file in the above entitled action; but that said A. E. Webber is now deceased;

Now Therefore, it is stipulated, subject to confirmation by the court, that defendant A. E. Webber,

or his representative, [52] shall not be required to plead to the complaint on file in the above entitled action except upon ten (10) days' written notice from the attorneys for plaintiff to attorneys for defendants so to do; and that by reason of this stipulation the default of said A. E. Webber, deceased, shall not be taken during such time as said defendant, or his representative, shall, pursuant to this stipulation, be granted time within which to plead.

Dated: April 21st, 1941.

PAUL S. JORDAN

BYRNE, LAMSON & JORDAN

Attorneys for Plaintiff

STANLEY PEDDER AND

KENNETH FERGUSON

PILLSBURY, MADISON &

SUTRO

LONG & LEVIT

Attorneys for Defendants

So Ordered this day of April, 1941.

Judge of the District Court.

[Endorsed]: Filed Apr. 22, 1941. [53]

In the United States District Court, Northern
District of California, Southern Division

No. 25937-S

In the Matter of THE JOSHUA HENDY IRON
WORKS (whose name has been changed to
HENDY REALIZATION CO.), a corporation,
Debtor

HENDY REALIZATION CO., (formerly THE
JOSHUA HENDY IRON WORKS), a cor-
poration, et al,

Petitioners

vs.

HAROLD M. F. BEHNEMAN and GLADYS M.
SHORES,

Respondents

No. 21792-S

GLADYS M. SHORES,

Plaintiff

vs.

HENDY REALIZATION CO., a corporation, et al,
Defendants

INTERROGATORIES PROPOUNDED BY THE
ABOVE NAMED PLAINTIFF, GLADYS M.
SHORES, AND BY THE ABOVE NAMED
RESPONDENTS, GLADYS M. SHORES
AND HAROLD M. F. BEHNEMAN, PUR-
SUANT TO RULE 33 OF THE RULES OF
CIVIL PROCEDURE FOR THE DISTRICT
COURTS OF THE UNITED STATES

Come now the above named plaintiff, Gladys M. Shores, and [54] the above named respondents, Gladys M. Shores and Harold M. F. Behneman, and file the following interrogatories to the above named defendants and petitioners pursuant to Rule 33 of the Rules of Civil Procedure for the District Courts of the United States, the same to be answered by said defendants and petitioners in accordance with said Rule 33:

Interrogatory No. 1:

State the total amount of the reduced and/or deferred obligations (not including current and receivership obligations) of The Joshua Hendy Iron Works, now Hendy Realization Co., a corporation (hereinafter for convenience referred to as the "Hendy Co."), both secured and unsecured, immediately following the approval by the above entitled court on March 24, 1936 of the Plan of Reorganization of said company, payment of which was provided for in said Plan.

Interrogatory No. 2:

State what proportion of the obligations referred to in Interrogatory No. 1 were secured, and what proportion thereof were unsecured.

Interrogatory No. 3:

Of the total unsecured obligations referred to in the answer to Interrogatory No. 2, state how much thereof remained unpaid as of (a) December 31, 1936, (b) December 31, 1937, (c) December 31, 1938, (d) December 31, 1939, and (e) November 15, 1940.

Interrogatory No. 4:

Of the total secured obligations referred to in the answer to Interrogatory No. 2, state how much thereof remained unpaid as of (a) December 31, 1936, (b) December 31, 1937, (c) December 31, 1938, (d) December 31, 1939, and (e) November 15, 1940.

Interrogatory No. 5:

State whether any of the obligations referred to in Interrogatory No. 1 were settled and retired for less than their full [55] amount, as provided for in said Plan, and, if so, state the basis of such settlement in each instance so as to reflect the saving to Hendy Co. realized through such settlement.

Interrogatory No. 6:

State the total amount of the current obligations of the Hendy Co. on each of the dates referred to in Interrogatories Nos. 3 and 4.

Interrogatory No. 7:

State the total amount of salary and all other compensation (exclusive of corporate stock of Hendy Co.) actually paid by the Hendy Co. to defendant and petitioner W. R. Bassick as an officer and/or employee of the Hendy Co. for (a) the period from March 24, 1936 to December 31, 1936; (b) the year 1937; (c) the year 1938; (d) the year 1939; and (e) the year 1940.

Interrogatory No. 8:

State the total amount of salary and all other compensation (exclusive of corporate stock of Hendy Co.) actually paid by the Hendy Co. to defendant and petitioner Morris Levit as an officer and/or employee of the Hendy Co. for (a) the period from March 24, 1936 to December 31, 1936; (b) the year 1937; (c) the year 1938; (d) the year 1939; and (e) the year 1940.

Interrogatory No. 9:

State the total amount of salary and all other compensation (exclusive of corporate stock of Hendy Co.) actually paid by the Hendy Co. to defendant and petitioner Elmer M. Hyland as an officer and/or employee of the Hendy Co. for (a) the period from March 24, 1936 to December 31, 1936; (b) the year 1937; (c) the year 1938; (d) the year 1939; and (e) the year 1940.

Interrogatory No. 10:

State in full detail the substance and nature, and the date or dates of making, of all representations made by the Board of Directors of Hendy Co. to

defendants and petitioners Bassick, Hyland and Levit to the effect that the compensation received by them from the Hendy Co. subsequent to March 24, 1936 would be supplemented by additional reward, as stated in the resolution of said Board of Directors set forth on pages 6 and 7 of the petition filed in the above captioned reorganization proceeding on February 19, 1941.

Interrogatory No. 11:

State the actual profit received, or the estimated profit to be received, by the Hendy Co. on uncompleted contracts relating to work in progress at the company's Sunnyvale, California, plant, or elsewhere, on November 15, 1940.

Interrogatory No. 12:

State the full amount of consideration received by the Hendy Co. from MacDonald & Kahn, Inc., or its assignee, as purchaser of the Sunnyvale plant and equipment and other assets of the Hendy Co. on or about November 15, 1940.

Interrogatory No. 13:

State whether the good will of the Hendy Co. and the name "The Joshua Hendy Iron Works" was sold to MacDonald & Kahn, Inc., or its assignee, at the time of the sale of the said Sunnyvale plant and equipment of the Hendy Co. on or about November 15, 1940.

Interrogatory No. 14:

State and describe all other assets of the Hendy Co., in addition to its said Sunnyvale plant and

equipment, which were sold to MacDonald & Kahn, Inc., or its assignee, on or about November 15, 1940.

Interrogatory No. 15:

State what portion of the proceeds of sale of all Hendy Co. assets sold to MacDonald & Kahn, Inc., or its assignee, on or about November 15, 1940, were used by the Hendy Co. to pay the obligations deferred under the Hendy Plan of Reorganization which were still unpaid at the date of said sale.

Interrogatory No. 16:

State whether any additional compensation was paid to any [57] directors and/or officers and/or employees of the Hendy Co. during 1940.

Interrogatory No. 17:

If the answer to Interrogatory No. 16 is in the affirmative, then state (a) when and to what directors and/or officers and/or employees (naming them in each instance), and in what amounts in each instance, said additional compensation was paid; and (b) for what such additional compensation was paid, that is to say, the nature of the consideration received by the Hendy Co. therefor, in the case of each such director and/or officer and/or employee; and (c) whether payment of such additional compensation was pursuant to contract between the Hendy Co. and the directors and/or officers and/or employees to whom it was paid, or pursuant to resolution or resolutions of the Board of Directors of the Hendy Co.

Interrogatory No. 18:

State whether the following tabulation does or does not summarize the operations and deficit of the Hendy Co. for the period from April 1, 1935 to December 31, 1940, as represented by audit reports of John F. Forbes & Company, certified public accountants, rendered to the Hendy Co. on April 1, 1937, February 24, 1938, March 2, 1939 and March 14, 1940:

Balance of deficit, April 1, 1935.....	\$237,391.77
Subsequent adjustment of opening balances	
Decreases in net assets.....	\$13,584.32
Increases in net assets.....	5,050.98
	<hr/>
	8,533.34
Write-down of plant assets.....	320,999.60
Less: Profit on sale.....	131,232.47
	<hr/>
Net loss in plant assets.....	189,767.13
	<hr/>
Total.....	\$435,692.24
	<hr/>
Operating net income reported.....	97,888.31
Less: Net interim adjustments.....	2,753.79
	<hr/>
Adjusted operating net income.....	\$ 95,134.52
Reduction of liabilities by inauguration	
of Plan of Reorganization.....	76,401.00
Discount on treasury stock acquired.....	26,672.47
Discount of liabilities.....	17,084.37
	<hr/>
Total.....	\$215,292.36
	<hr/>
Deficit, December 31, 1940.....	\$220,399.88

Interrogatory No. 19:

If the answer to Interrogatory No. 18 is in the negative, then state in what particulars the summarization set forth in Interrogatory No. 18 is incorrect.

Interrogatory No. 20:

State the amounts of the net operating profits or losses of the Hendy Co. for the years 1937, 1938, 1939 and 1940, respectively.

Interrogatory No. 21:

State the amounts of the non-operating income or losses of the Hendy Co. for the years 1937, 1938, 1939 and 1940, respectively.

Interrogatory No. 22:

Did any conditions exist on November 1, 1940 which indicated that the business of the Hendy Co. could not be continued after March 24, 1941?

Interrogatory No. 23:

If the answer to Interrogatory No. 22 is in the affirmative, then state the character of such existing conditions.

Interrogatory No. 24:

State the total amount expended by the Hendy Co. for renewals and replacements to its Sunnyvale plant and equipment during each of the following years, to wit: 1937, 1938, 1939 and 1940.

Interrogatory No. 25:

State the total amount expended by the Hendy Co. for additions to its Sunnyvale plant and equip-

ment for each of the following years, to wit: 1937, 1938, 1939 and 1940.

Interrogatory No. 26:

With reference to the expenditures referred to in Interrogatories numbered 24 and 25, state what amount thereof was expended after November 1, 1940. [59]

Interrogatory No. 27:

State whether on the date of the granting to MacDonald & Kahn, Inc., or any other person or corporation, of the option to purchase the Sunnyvale plant and equipment of the Hendy Co. there were pending between the Hendy Co. and the United States Government any negotiations with reference to the granting to the Hendy Co. of any contract, or contracts, for the manufacture by the Hendy Co. of machine tools, machinery and/or other equipment and/or products of any kind for the United States Government, or any of its agencies or instrumentalities, or as subcontractor, with any other person or persons holding or contemplating any contracts with the United States Government, or any of its agencies or instrumentalities.

Interrogatory No. 28:

If the answer to Interrogatory No. 27 is in the affirmative, then describe in detail the character and status of such contract negotiations on the date of the granting of said purchase option.

Interrogatory No. 29:

State the name of the purchaser or purchasers to whom the Sunnyvale plant and equipment of the Hendy Co. was sold in November of 1940.

Interrogatory No. 30:

State whether the Hendy Co. declared and/or paid any dividends on any of its outstanding stock from March 24, 1936 to November 15, 1940.

Dated: May 19th, 1941.

BYRNE, LAMSON & JORDAN
PAUL S. JORDAN

Attorneys for the above named plaintiff, Gladys M. Shores, and the above named respondents, Gladys M. Shores and Harold M. F. Behneman

Receipt of Service

[Endorsed]: Filed May 19, 1941. [60]

[Title of District Court and Cause.—Nos. 21792-S and 25937-S.]

OBJECTIONS TO INTERROGATORIES PRO-
POUNDED BY PLAINTIFF, GLADYS M.
SHORES, AND RESPONDENTS, GLADYS
M. SHORES AND HAROLD M. F. BEHNE-
MAN, PURSUANT TO RULE 33 OF THE
RULES OF CIVIL PROCEDURE FOR
THE DISTRICT COURT OF THE UNITED
STATES. FILED HEREIN ON MAY 19,
1941, AND MOTION FOR ENLARGING
THE TIME TO ANSWER [61]

Petitioners and defendants herein present the following objections to the interrogatories propounded by plaintiff and respondents herein pursuant to Rule 33 of the Rules of Civil Procedure for the District Court of the United States, and for grounds of objection specify as follows:

Interrogatory No. 6:

The meaning of "current operations" appearing in this interrogatory is uncertain and ambiguous and should be defined by plaintiff and respondents in order that the moving parties may answer this interrogatory in an intelligible manner.

Interrogatories Nos. 7, 8 and 9:

These interrogatories are identical with the exception that they each refer to a different defendant and petitioner in this action. Answers to these interrogatories would have no bearing whatever on the controversy, and therefore, the interrogatories are irrelevant, incompetent and immaterial.

Interrogatory No. 10:

An answer to this interrogatory would have no bearing on the controversy and the interrogatory is therefore irrelevant, incompetent and immaterial, and moreover, may call for opinions and conclusions.

Interrogatory No. 11:

The query as to the "estimated profit to be received," calls for an opinion and conclusion.

Interrogatory No. 15:

This interrogatory calls for an opinion and conclusion.

Interrogatories Nos. 16 and 17:

These interrogatories call for opinions and conclusions, and moreover, are ambiguous as the meaning of "additional compensation" is not defined.

[62]

Interrogatories Nos. 18 and 19:

These interrogatories call for opinions and conclusions and are not within the scope of Rule 33.

Interrogatories Nos. 22 and 23:

These interrogatories call for opinions and conclusions.

Interrogatories Nos. 27 and 28:

These interrogatories call for opinions and conclusions and any answer would have no bearing on the controversy, and therefore, the interrogatories are irrelevant, incompetent and immaterial.

In addition to the objections to the interrogatories set forth herein, petitioners and defendants respectfully move the court to enlarge the time to answer the interrogatories not objected to, and those of the above interrogatories that the court may order petitioners and defendants to answer, for the reason that the nature of the interrogatories requires a certain period of time within which to obtain the information requested, and this will not delay the trial of the cause nor prejudice plaintiff and respondents.

Dated: May 29, 1941.

KENNETH FERGUSON
BERT W. LEVIT
PILLSBURY, MADISON &
SUTRO
GERALD E. LEVIN

Attorneys for Petitioners and Defendants.

[Endorsed]: Filed May 29, 1941. [63]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 23rd day of June, in the year of our Lord one thousand nine hundred and forty-one.

Present: the Honorable A. F. St. Sure, District Judge.

[Title of District Court and Cause—No. 21792-S. Civil.]

Paul S. Jordan, Esq., appearing as attorney for plaintiff, and Gerald E. Levin, Esq., appearing as attorney for defendant. After hearing attorneys, it is Ordered that the objections to interrogatories Nos. 10, 11, 15, 18, 19, 22, 23, 27 and 28 be sus-

tained and that objections to the other interrogatories be overruled. On motion of Mr. Levin, Ordered that the defendant have until July 23rd, 1941, to answer the interrogatories. [64]

[Title of District Court and Cause.—No. 21792-S.]

NOTICE

To: Messrs. Bryne, Lamson & Jordan,
1249 Russ Building,
San Francisco, California.

Kenneth Ferguson, Esq.,
Stanley Pedder, Esq.,
Financial Center Building,
San Francisco, California.

Messrs. Pillsbury, Madison & Sutro,
Attorneys at Law,
Standard Oil Building,
San Francisco, California.

Messrs. Long & Levit,
Attorneys at Law,
Merchants Exchange Building,
San Francisco, California.

You Are Hereby Notified that on June 23rd, 1941, Judge A. F. St. Sure Ordered that the objections to Interrogatories Nos. 10, 11, 15, 18, 19, 22, 23, 27 and 28 be Sustained and that objections to the other interrogatories be Overruled. On motion of Mr.

Levin, Ordered that the defendant have until July 23rd, 1941, to answer the interrogatories.

WALTER B. MALING,
Clerk.

San Francisco, California, (a)
June 23rd, 1941. [65]

[Title of District Court and Cause.—Nos. 25937-S
and 21792-S.]

ANSWERS TO INTERROGATORIES [66]

Come now petitioners and defendants in the above entitled causes, and, within the time provided by Order of the above entitled court, herewith answer those certain interrogatories propounded by Gladys M. Shores and Harold M. F. Behneman, which were allowed by Order of the above entitled court duly given and made on June 23, 1941, as follows:

State of California,
City and County of San Francisco—ss.

C. B. Moores, being first duly sworn, deposes and says:

That he is, and at all times herein mentioned has been, an officer, to-wit, the Vice-President, of Hendy Realization Co., a California corporation (formerly The Joshua Hendy Iron Works), the debtor and one of the petitioners and defendants above named, and as such makes these answers to the interrogatories propounded in the above entitled causes by Gladys M. Shores and Harold M. F. Behneman; that said answers are true of affiant's own knowl-

edge, except as to those matters stated upon information and belief, and as to those matters affiant believes the same to be true; and that insofar as said interrogatories require, and said answers give, figures and amounts from the debtor corporation's records, the same have been prepared pursuant to affiant's instruction and affiant is informed and believes the same to be true.

1. Answer to Interrogatory No. 1. The total amount of the reduced and/or deferred obligations (not including current and receivership obligations) of Hendy Realization Co. (formerly The Joshua Hendy Iron Works), both secured and unsecured, immediately following the approval by the above entitled court of the plan of reorganization of said company on March 24, 1936, was \$570,044.97; which said amount included additional Federal income tax assessed for 1927 and 1928 in the amount of \$2,450.59, and interest in the amount of \$1,362.90, accrued thereon to the date of payment, [67] March 27, 1936.

2. Answer to Interrogatory No. 2. Of said total obligations, \$202,362.06 were unsecured, and \$367,682.91 were secured.

3. Answer to Interrogatory No. 3. The principal amount of said unsecured obligations remaining unpaid upon the following dates were:

December 31, 1936	\$198,473.32
December 31, 1937	198,473.32
December 31, 1938	198,473.32
December 31, 1939	143,970.35
November 15, 1940	143,522.96

4. Answer to Interrogatory No. 4. The principal amount of said secured obligations remaining unpaid as of the following dates were:

December 31, 1936	\$367,682.91
December 31, 1937	327,643.71
December 31, 1938	325,308.71
December 31, 1939	308,587.06
November 15, 1940	131,443.61

5. Answer to Interrogatory No. 5. In accordance with a resolution passed by the Board of Directors at a meeting held November 21, 1939, the corporation offered to pay holders of the unsecured five-year notes an amount of cash equal to 70% of the principal amount of said notes in full settlement and satisfaction of all claims arising out of said notes. Holders of \$55,589.63 principal amount of unsecured notes accepted said offer, the discount amounting to \$16,676.96.

6. Answer to Interrogatory No. 6. The current liabilities of the corporation as of the following dates were:

December 31, 1936	\$ 21,378.18
December 31, 1937	39,764.81
December 31, 1938	290,060.27
December 31, 1939	68,622.70
November 15, 1940	20,259.81

7. Answer to Interrogatory No. 7. The salary and other compensation (exclusive of capital stock) paid to W. R. Bassick, as an officer and employee

of the corporation, during the following periods were: [68]

March 24, 1936, to December 31,	
1936	\$ 6,000.00
Year ended December 31, 1937.....	7,200.00
Year ended December 31, 1938.....	9,000.00
Year ended December 31, 1939.....	10,100.00
Year ended December 31, 1940.....	50,801.82

8. Answer to Interrogatory No. 8. The salary and other compensation (exclusive of capital stock) paid to Morris Levit, as an officer and employee of the corporation, during the following periods were:

March 24, 1936, to December 31,	
1936	\$ 4,000.00
Year ended December 31, 1937.....	4,800.00
Year ended December 31, 1938.....	6,000.00
Year ended December 31, 1939.....	6,000.00
Year ended December 31, 1940.....	24,717.50

9. Answer to Interrogatory No. 9. The salary and other compensation (exclusive of capital stock) paid to Elmer M. Hyland, as an officer and employee of the corporation, during the following periods were:

March 24, 1936, to December 31,	
1936	\$ 3,500.00
Year ended December 31, 1937.....	4,775.00
Year ended December 31, 1938.....	6,000.00
Year ended December 31, 1939.....	6,700.00
Year ended December 31, 1940.....	25,241.67

10. Answer to Interrogatory No. 12. It is impossible to state, at this time, the full amount of consideration received by the corporation from the purchaser of the corporation's Sunnyvale plant and properties, since final adjustments in this regard have not yet been fully effected. The corporation received the sum of \$426,000.00 in cash, which said sum is subject to adjustments for work in progress, taxes, and other matters incident to the sale of a going business.

11. Answer to Interrogatory No. 13. The name "The Joshua Hendy Iron Works" was sold together with the sale of the corporation's Sunnyvale plant and properties, but the corporation's good will was not. [69]

12. Answer to Interrogatory No. 14. In addition to, and included in the sale of its Sunnyvale plant and properties, the corporation sold its inventory of coke, iron, and merchandise held for sale and in the process of manufacture in its Sunnyvale plant, its shop rights, its San Francisco office furniture and fixtures, and, as above noted, its name "The Joshua Hendy Iron Works."

13. Answer to Interrogatory No. 16. Yes.

14. Answer to Interrogatory No. 17. Pursuant to resolutions of the Board of Directors of the corporation additional compensation was paid during the year 1940 to certain of the corporation's officers and employees. The nature and amount thereof is indicated in the resolutions of the Board of Direc-

tors authorizing said payments, which said resolutions were as follows:

March 18, 1940

“The payment by the corporation on December 20, 1939 of the following bonuses totalling \$6,000.00 and an increase in the salary of Mr. Levit of \$50.00 per month was approved on motion made by Mr. Price, seconded by Mr. Webber and unanimously carried.

W. R. Bassick	\$2,000.00
E. M. Hyland	1,000.00
M. Levit	450.00
Margaret Terry	250.00
C. B. McAulay.....	350.00
J. L. Whitehead.....	300.00
C. E. Birkenbeul.....	250.00
R. N. Parkin.....	225.00
D. G. Burdick.....	25.00
J. M. Brown.....	200.00
F. L. McAdam.....	50.00
L. A. Wall.....	25.00
V. D. Kowell.....	300.00
A. R. Sillers.....	150.00
W. C. Theller.....	150.00
R. M. Spedding.....	150.00
W. G. Vierra.....	100.00
W. K. Plummer.....	25.00

\$6,000.00”

December 2, 1940

“Director C. B. Moores then called the following facts to the attention of the Board of Directors:

“(1) That certain of the officers and employees of the corporation have, since its reorganization, rendered extremely valuable services to the [70] corporation resulting in its rehabilitation as a sound and going business, and the improvement of the financial condition of the company from a point where the stockholders of the company had little or no equity as evidenced by the records of the reorganization of the corporation under Section 77B of the Bankruptcy Act, to a point where the equity of the stockholders has become very substantial;

“(2) That it was this rehabilitation of the corporation’s business, so occasioned, which made possible the advantageous sale of the Sunnyvale plant and properties of the corporation, just consummated;

“(3) That notwithstanding the value of such services to the corporation, the compensation of such officers and employees has not been commensurate therewith; and that the Board, through its Directors, has repeatedly represented to such officers and employees that the compensation received by them during said period would be supplemented by additional payment therefor as soon as in the

opinion of the Board such further payment was practicable and expedient; and

“(4) That, in addition, due to the sale of the corporation’s Sunnyvale plant and properties, the employment of said officers and employees has necessarily been abruptly severed and their vacation and other rights interfered with;

and he suggested that, since the affairs and position of the corporation now warranted the Board’s action in such connection, the Board consider the proper payment and reward of such officers and employees on account of their said services and in relation to their respective contributions to the restoration of the corporation. This being the consensus of the meeting, an extended and detailed discussion upon the matter was thereupon had, all Directors participating, in an effort to work out a definitive plan for such payment commensurate with the best interests of the corporation and the fair and proportionate payment and reward of such officers and employees. Various tentative proposals in this regard were made and considered, and thereupon, and upon motion duly made, seconded, and unanimously carried, the meeting was duly adjourned to Wednesday, December 4, 1940, at eleven o’clock A. M., in order that the Directors should have an opportunity to further consider and weigh said proposals prior

to, and so as to enable, matured and final action thereupon."

December 4, 1940 (adjourned meeting)

"The President stated that the first business of the meeting was the consideration of Mr. Moores' suggestion under advisement at the previous meeting, and the various proposals presented at the meeting of the Board of Directors on December 2, 1940, relative to the compensation of certain of the officers and employees of the corporation. Further discussion upon the matter was thereupon had, at [71] the conclusion of which it was moved by Director C. B. Moores, seconded by Director A. Webber, and unanimously carried—Director W. R. Bassick, however, expressly not participating in said vote—that the following resolution be adopted (expressly, however, without prejudice to the right of the Board, acting as Voting Trustees pursuant to the confirmed plan of reorganization of the corporation, to further reward the managing officers of the corporation for their services by the distribution of capital stock of the corporation as provided, *inter alia*, in Paragraph G-2 of said plan of reorganization):

"Whereas, the financial position, business, and affairs of this corporation have, since its reorganization, evidenced steady and substantial improvement to the point that they

have become sound, business-like, and satisfactory in condition; and

“Whereas, the achievement of this fact has been made possible only by the unselfish and unremitting efforts and diligence of certain of its officers and employees since its reorganization; and

“Whereas, throughout this entire period, this corporation has not paid such officers and employees for their services in accordance with the full value thereof to this corporation, but said officers and employees have been paid therefor and have accepted substantially less than the value of their said services to this corporation in consideration of the fact, and upon the representation of this Board of Directors, that a further payment, which with the amount already paid, would constitute a fair payment therefor, would be made at a later but the earliest expedient date; and

“Whereas, the affairs and position of this corporation are now such that said officers and employees can be paid for their said services, and it is fair and just that said officers and employees should be rewarded for their said services and paid therefor, and for the severance of their employment and interference with their vacation and other rights occasioned by the sale of the Sunnyvale plant and properties of this corporation; and

“Whereas, it appears to be for the best interests of this corporation that the following resolution be adopted;

“Now therefore, be it resolved, that this corporation forthwith pay the following amounts to the following of the officers and employees of this corporation in recognition, appreciation, payment, and reward for their exemplary and valuable services to this corporation:

W. R. Bassick	\$40,000.00
E. M. Hyland	20,000.00
M. Levit	20,000.00
C. B. McAulay	10,000.00
C. E. Birkenbeul	3,000.00
J. M. Brown	3,000.00

[72]

J. L. Whitehead	1,000.00
R. N. Parkin	1,000.00
Frank L. McAdam	500.00
Margaret Terry	500.00
C. Cortage	500.00
A. R. Sillers	500.00
W. C. Theller	500.00
R. M. Spedding	500.00
L. A. Wall	100.00
Grace Miguelgorry	100.00
Juliette del Castillo	100.00
Ruth Barbier	100.00
Gerda Mangels	100.00
Thelma Broeder	100.00

“And be it further resolved, that the officers of this corporation be and they are hereby authorized and directed to take such steps and to make such payments as shall be necessary or desirable to effectuate and carry this resolution into effect.”

“Director C. B. Moores called the Board’s attention to the fact that among the remaining properties of the corporation there was a Nash Sedan automobile, heretofore used by the President, W. R. Bassick, and that while said automobile might be useful in the winding up of the affairs of the corporation, its liquidation value to the corporation was nominal and the expense of its operation should, if possible, be avoided. Thereupon, upon motion duly made, seconded, and unanimously carried—Director W. R. Bassick, however, not participating in the vote—the following resolution was adopted:

“Be it resolved, that, in recognition, appreciation, payment, and partial reward for the exemplary and valuable services of W. R. Bassick to this corporation, this corporation forthwith assign, transfer, and set over unto said W. R. Bassick all of its right, title, and interest in and to the Nash Sedan automobile owned by this corporation; provided that said W. R. Bassick shall agree that, in consideration of such transfer to him, said Nash Sedan automobile, or its equivalent, shall be available for his use, at his expense, in con-

nection with the winding up of the corporation's affairs.

“And be it further resolved, that the Vice-President and Secretary or Assistant Secretary of this corporation be and they are hereby authorized, empowered, and directed, for and on behalf of this corporation, and as its corporate act and deed, to execute any such assignment or other documents as may be necessary to effect the transfer hereinabove resolved and/or necessary or desirable to effectuate the purposes of this resolution.”

[73]

December 20, 1940

“Minutes of the last meeting of the Board of Directors held on December 4, 1940, were thereupon read. Director C. B. Moores reported that in the resolution authorizing payments to certain of the officers and employees of the corporation in recognition, appreciation, payment, and reward for their exemplary and valuable services to the corporation the names of two of the employees of the corporation who had rendered such valuable services to this corporation had, through inadvertence, been omitted from the list contained in the resolution; and accordingly, upon motion duly made, seconded, and unanimously carried said resolution was supplemented by the addition of the following names of employees to be paid the following amounts:

William Vierra	\$250.00
Willard Plummer	\$250.00;

and it was directed that the officers should pay these amounts in the same manner as the other amounts directed by said resolution to said employees in recognition, appreciation, payment, and reward for their exemplary and valuable services to the corporation. As thus supplemented, the minutes of the last meeting of the Board of Directors held on December 4, 1940, were approved.

“Upon motion duly made, seconded, and unanimously carried, Director W. R. Bassick, however, expressly not participating in the vote, the following resolution was adopted:

“Whereas, under the terms of the confirmed plan of reorganization of this corporation and the Voting Trust created pursuant thereto, 2212-1/2 shares of the capital stock of this corporation are now held by this Board, as Voting Trustees, free and clear of any claim, right, title, or interest therein by the former stockholders surrendering the same, and subject to the distribution by this Board, in its sole discretion, either in whole or in part to the managing officers of this corporation as a reward for their management and the successful rehabilitation of the corporation's affairs; and

“Whereas, the officers of this corporation hereinafter named have, since its reorganiza-

tion, rendered extremely valuable services to, and in the management of, the corporation, resulting in its rehabilitation as a sound and going business, and the improvement of the financial condition of the corporation from a point where the stockholders of the corporation had no equity, as evidenced by the records of the reorganization of the corporation under Section 77B of the Bankruptcy Act, to a point where the equity of the stockholders has become very substantial; and

“Whereas, the financial position, business, and affairs of this corporation have, since its reorganization, evidenced steady and substantial improvement to the point that they have become rehabilitated, [74] sound, business-like, and satisfactory in condition, and such rehabilitation of the corporation’s business so occasioned has made possible the advantageous sale of the Sunnyvale plant and properties of the corporation just consummated; and

“Whereas, notwithstanding the value of such services to this corporation, the compensation of such officers has not been commensurate therewith, and this Board, through its Directors, has repeatedly represented to such officers that the compensation received by them during said period would be supplemented by additional reward as soon as in

the opinion of the Board such further reward was practical and expedient; and

“Whereas, in addition, due to the sale of the corporation’s Sunnyvale plant and properties, the employment of certain of said officers has necessarily been severed, and their vacation and other rights interfered with; and

“Whereas, it appears just and proper that said 2212-1/2 shares of the capital stock of this corporation held by this Board, as aforesaid, be issued to said managing officers, subject to the condition hereinafter set forth, as a reward for their successful management and rehabilitation of the corporation’s affairs; and it appears to be for the best interests of this corporation that the following resolution be adopted:

“Now, therefore, be it resolved, that this Board forthwith distribute said 2212-1/2 shares of the capital stock of this corporation so held by it to the following persons in the respective amounts hereinafter set forth, in recognition, appreciation, payment, and reward for their exemplary and valuable services to this corporation and as a reward for their management and the successful rehabilitation of the corporation’s affairs:

W. R. Bassiek	812-1/2 shares
E. M. Hyland	700 shares
M. Levit	700 shares;

provided, however, that each such person shall, prior to, and as a condition precedent to, receiving such distribution of stock, waive in writing the right of such person to receive any dividends or distribution upon said stock out of the first \$85,848.75 available for dividends or distribution upon the capital stock of this corporation, in dissolution or otherwise, so that the said sum of \$85,848.75 may be pro-rated and paid by way of dividend, distribution, or otherwise (or set aside for such payment), only to the holders of the remaining 1907-3/4 shares of the outstanding stock of the corporation now held by this Board as Voting Trustees, to the end that said persons holding said 2212-1/2 shares hereby distributed shall only participate in dividends or distributions upon the capital stock of this corporation made in excess of said sum of \$85,848.75, as aforesaid. [75]

“And be it further resolved, that the President or Vice-President and the Secretary or Assistant Secretary of this corporation be and they are hereby authorized and directed, for and on behalf of this Board, to take all such steps and to execute all such documents as may be necessary or desirable to effectuate the distribution, transfer, and delivery of said stock to said officers, as aforesaid, and to fully effectuate the purposes of this resolution.”

15. Answer to Interrogatories Nos. 20 and 21. These two interrogatories may be more comprehensively answered together as follows:

	Year Ended December 31			
	1937	1938	1939	1940
Net profit from operations	\$59,447.70	— \$8,897.32	\$208,787.58	\$ 47,501.77
Other income credits	4,331.22	3,849.32	4,695.80	153,018.61
Surplus credits.....	480.77	—	16,580.19	30,175.15
	<hr/> 64,259.69	<hr/> — 5,048.00	<hr/> 230,063.57	<hr/> 230,695.53
Income charges.....	7,862.60	3,470.79	38,534.04	35,033.78
Interest expense.....	11,227.23	11,422.28	23,692.64	12,342.74
Surplus charges.....	128.59	—	5,648.21	1,479.34
Net income.....	<hr/> <u>\$45,041.27</u>	<hr/> <u>— 19,941.07</u>	<hr/> <u>162,188.68</u>	<hr/> <u>181,839.67</u>

16. Answer to Interrogatories Nos. 24 and 25. The corporation's working papers do not differentiate between cost of renewals, replacements, and additions. The additions to the Sunnyvale Plant and Equipment Account for the following years were:

	Year Ended December 31			
	1940	1939	1938	1937
Machinery and equipment.....	\$2,524.83	\$2,628.20	\$61,094.39	\$2,567.65
Furniture and fixtures.....	—		531.72	114.45
Automobiles		728.71	785.14	
Stock drawings, sketches and patterns	1,162.69	4,153.61	8.74	1,616.18
Total.....	<hr/> <u>\$3,687.52</u>	<hr/> <u>7,510.52</u>	<hr/> <u>62,419.99</u>	<hr/> <u>4,298.28</u>

17. Answer to Interrogatory No. 26. None.

18. Answer to Interrogatory No. 29. On November 4, 1940, the corporation, in consideration of

the payment of \$10,000.00, [76] gave an option for the purchase of the corporation's Sunnyvale plant and properties to MacDonald & Kahn, Inc. MacDonald & Kahn, Inc. subsequently assigned all of its right, title, and interest in and to the option to Felix Kahn, Trustee, who subsequently exercised said option.

19. Answer to Interrogatory No. 30. No.
Further affiant sayeth not.

C. B. MOORES

Subscribed and sworn to before me this 23rd day of July, 1941.

(Notarial Seal) LILLIAN RALSTON

Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires December 22, 1944.

Receipt of Service.

[Endorsed]: Filed July 23, 1941. [77]

District Court of the United States
Northern District of California
Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 30th day of September, in the year of our Lord one thousand nine hundred and forty-one.

Present: the Honorable A. F. St. Sure, District Judge.

[Title of Cause—No. 21792-S Civil.]

The parties being present as heretofore, the further trial of these consolidated cases was resumed. Mr. Jordan renewed his motion to strike Defendant's Exhibits "E", "E-1", "E-2", "E-3", "E-4", and "E-5", introduced at the trial, and renewed his motion to dismiss the petition filed on February 19, 1941, by The Joshua Hendy Iron Works, etc. in Bankruptcy Case No. 25937, In the Matter of The Joshua Hendy Iron Works, a corporation, Debtor; and renewed his objections to the certificate and report on the jurisdiction of question made by Burton J. Wyman and filed on March 28, 1941, in Bankruptcy Case No. 25937, aforesaid. It is Ordered that said motions be denied and the objections overruled.

The case was argued by Mr. Jordan and Mr. Ferguson and submitted to the Court for consideration and decision. Due consideration being had thereon, it is, in accordance with an order this day signed and filed Ordered that the certificate and report of the Special Master filed herein on March 28, 1941, be approved and confirmed. The Special Master is allowed the sum of \$100.00 as compensation for his services and the further sum of \$20.00 for office and clerical expenses, to be paid by petitioners and taxed as costs against respondents.

The motions of respondents Behneman and Shores, and each of them, to dismiss the petition and to vacate the restraining order are hereby denied, plaintiff Gladys Shores to take nothing by her action No. 21792-S, removed to this Court and filed herein on February 25, 1941. It is further Ordered that respondents Behneman and Shores shall take nothing by their answer and cross-complaint to the petitions filed herein on February 19, 1941, and on March 11, 1941; that Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, et als., shall have judgment as prayed for in their petitions filed herein on February 19, 1941, and on March 11, 1941, together with costs of suit. Counsel for The Hendy Realization Co. may submit findings of fact and conclusions of law and decrees accordingly. [78]

[Title of District Court and Cause— Nos. 25937-S and 21792-S.]

ORDER FOR JUDGMENT [79]

On March 24, 1936, this court made and entered its order confirming a plan of reorganization of The Joshua Hendy Iron Works, a corporation, debtor, under and pursuant to the provisions of 77B of the Bankruptcy Act. Said plan was to continue for a period of five years, the date of its termination being March 24, 1941.

On January 17, 1941, Gladys M. Shores filed an action in the Superior Court of the State of California seeking declaratory and injunctive relief, and for the cancellation of certain stock certificates, all growing out of, related to and involved in said reorganization proceedings. The action was removed here.

On February 19, 1941, The Joshua Hendy Iron Works, whose name has been changed to Hendy Realization Co., a corporation, filed in this court a petition for an order "aiding, enforcing, effectuating, and protecting the adjudication, order and decree" of the court confirming the plan of reorganization, "and preventing and enjoining the threatened interference with and defeat of said adjudication."

On March 11, 1941, this court made and entered its order restraining further proceedings in certain actions filed in the state courts, all relating to the effectuation of said plan of reorganization.

Thereafter respondents Harold M. F. Behneman and Gladys M. Shores moved to dismiss the petition of February 19, 1941, and to vacate the restraining order of March 11, 1941. These motions were referred to a Special Master for hearing and report. On March 28, 1941, the Master filed herein his certificate and report. [80]

On April 7, 1941, counsel for the respective parties stipulated that all actions and matters involved herein should be consolidated for trial in this

court. Thereafter issue was joined and a trial had upon the merits.

Upon hearing argument of respective counsel, and considering all of the evidence, the case being this day submitted for decision,

It is ordered:

1. The certificate and report of the Special Master filed herein on March 28, 1941, is approved and confirmed. The Special Master is allowed the sum of \$100 as compensation for his services and the further sum of \$20 for office and clerical expenses, to be paid by petitioners and taxed as costs against respondents.

2. The motions of respondents Behneman and Shores, and each of them, to dismiss the petition and to vacate the restraining order are hereby denied.

3. The plaintiff Gladys Shores shall take nothing by her action No. 21792S removed to this court and filed herein on February 25, 1941.

4. The respondents Behneman and Shores shall take nothing by their answer and cross-complaint to the petitions filed herein on February 19, 1941, and on March 11, 1941.

5. The Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, et als. shall have judgment as prayed for in their petitions filed herein on February 19, 1941 and on March 11, 1941, together with costs of suit. [S1]

Counsel for The Hendy Realization Co. may sub-

mit findings of fact and conclusions of law, and decrees, accordingly.

Dated: September 30, 1941.

A. F. ST. SURE

United States District Judge

[Endorsed]: Filed Sept. 30, 1941. [82]

[Title of District Court and Cause—Nos. 25937S
21792-S

NOTICE

To: Messrs. Byrne, Lamson & Jordan

Attorneys at Law

1249 Russ Building

San Francisco, California

Kenneth Ferguson, Esq.

Stanley Pedder, Esq.

Attorneys at Law

Financial Center Building

San Francisco, California

Messrs. Pillsbury, Madison & Sutro

Attorneys at Law

Standard Oil Building

San Francisco, California

Messrs. Long & Levit

Attorneys at Law

Merchants Exchange Building

San Francisco, California

You are hereby notified that on September 30, 1941, Judge A. F. St. Sure ordered that the cer-

tificate and report of the Special Master filed herein on March 28, 1941, be approved and confirmed. The Special Master is allowed the sum of \$100 as compensation for his services and the further sum of \$20 for office and clerical expenses, to be paid by petitioners and taxed as costs against respondents; that the motions of Respondents Behneman and Shores, and each of them, to dismiss the petition and to vacate the restraining order are hereby denied, Plaintiff Gladys Shores to take nothing by her action No. 21792-S, removed to this Court and filed herein on February 25, 1941; that Respondents Behneman and Shores shall take nothing by their answer and cross-complaint to the petitions filed herein on February 19, 1941, and on March 11, 1941; that Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, et als., shall have judgment as prayed for in their petitions filed herein on February 19, 1941, and on March 11, 1941, together with costs of suit. Counsel for The Hendy Realization Co. may submit findings of fact and conclusions of law, and decrees accordingly.

San Francisco, California, October 1, 1941.

WALTER B. MALING,

Clerk, U. S. District Court

[83]

[Title of District Court and Cause—Nos. 25937-S, 21792-S.]

CONSOLIDATED FINDINGS OF FACT AND
CONCLUSIONS OF LAW [84]

The above entitled causes and the pending proceedings therein, having been consolidated by stipulation of the parties and the order of the above entitled court duly given and made, came on regularly for trial in the above entitled court on the 23rd day of September, 1941, before the Honorable A. F. St. Sure, Judge, presiding, without a jury; plaintiff and respondent Gladys M. Shores and respondent Harold M. F. Behneman appearing by their counsel, Byrne, Lamson & Jordan, by Paul S. Jordan, Leo D. Byrne, and John W. Skinner; debtor, petitioner, and defendant The Joshua Hendy Iron Works (whose name has been changed to Hendy Realization Co.), petitioners and defendants A. J. Mayman, C. B. Moores, E. H. Price, and W. R. Bassick, individually and as Directors of Hendy Realization Co., and petitioners and defendants Elmer M. Hyland and Morris Levit appearing by their counsel, Stanley Pedder and Kenneth Ferguson, Pillsbury, Madison & Sutro, and Long & Levit, by Kenneth Ferguson, Gerald S. Levin, and Bert W. Levit; and it being stipulated that no relief of any sort was sought against defendant A. E. Webber, deceased, either individually or as Director of Hendy Realization Co.; and after trial on that date and on September 24, 25, 26, and 30, 1941, and the introduction and receipt of evidence, both

oral and documentary, on behalf of the respective parties, and the causes consolidated by the court having been argued and submitted to the court for its decision, and the court having before it the records and files in the above entitled causes and having considered the evidence adduced and the arguments of counsel, and being fully advised in the premises, does now make the following: [85]

CONSOLIDATED FINDINGS OF FACT

I.

That it is true that Hendy Realization Co. is, and at all times mentioned herein has been, a corporation organized and existing under and by virtue of the laws of the State of California, and with its principal office and place of business within said state in the City and County of San Francisco, and within the territorial jurisdiction of the above entitled court, namely, within the Southern Division of the Northern District of California; that at all times herein mentioned, and until December 2, 1940, the name of said corporation was The Joshua Hendy Iron Works; that on December 2, 1940, pursuant to corporate proceedings duly had for such purpose the articles of incorporation of said corporation were duly amended so as to change the name of said corporation to Hendy Realization Co.; that, for convenience, said corporation is hereinafter sometimes referred to as Hendy Co.

II.

That it is true that on March 4, 1935, the above entitled proceedings, numbered herein "No. 25937-S," were filed and instituted in the above entitled court by creditors of Hendy Co. for the reorganization of said corporation as a debtor pursuant to the provisions of sections 77A and 77B of the act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and acts amendatory thereof and supplementary thereto, hereinafter more generally referred to as the "Bankruptcy Act"; and were thereafter prosecuted as more fully appears from these findings and the records and files of the above entitled court in the above entitled proceedings. [86]

III.

That it is true that pursuant and subsequent to the institution of the above entitled proceedings for corporate reorganization, such proceedings were duly and regularly taken and had that a plan for the reorganization of Hendy Co. as debtor was duly presented by the creditors of said corporation who filed the original petition for corporate reorganization as aforesaid together with Albertie M. Hendy, a stockholder of said corporation, and said plan was filed, heard, and duly reported upon by the Honorable Burton J. Wyman, Special Master, and was duly and fully and in all respects accepted by creditors and stockholders of said corporation whose

interests were affected thereby, as required by the provisions of said sections 77A and 77B of the Bankruptcy Act; that the above entitled court duly gave and made its order dated March 24, 1936, approving and confirming said plan of reorganization and authorizing, empowering, and directing the reorganization of said corporation as debtor pursuant thereto; that said order is a part of the records and files of the above entitled court in the above entitled proceedings, and is incorporated herein by reference the same as though here set forth in full, and said order is still in full force and effect; that on January 27, 1937, the above entitled court duly gave, made, and entered its order and decree denominated "Final Decree Approving and Confirming Report of Execution and Accomplishment of Confirmed Plan of Reorganization * * *," which said decree is incorporated herein by reference the same as though here set forth in full; that it is not true that in or by said decree the proceedings were determined by the above entitled court or by any of the judges of the above entitled court, other than as provided in and by the language of said decree itself and by [87] the law applicable thereto; that it is not true that there was no reservation of jurisdiction provided for in said decree with respect to any matter involved in said plan of reorganization, but on the contrary that it is true that the above entitled court has always had and reserved, inter alia, jurisdiction to hear and determine any matters relating to the meaning, inter-

pretation, effect, effectuation, and protection of said decree; that it is not true that subsequent to the entry of said decree and prior to February 19, 1941, no further proceedings of any kind were had or taken in connection with said corporate reorganization.

IV.

That it is true that at the time the above entitled court approved and confirmed the said plan of reorganization as aforesaid, there were 4,425 shares of the capital stock of Hendy Co. outstanding; that said corporation, as of July 31, 1935, had outstanding obligations both secured and unsecured, exclusive of current liabilities, amounting to approximately \$623,170.14, and on March 24, 1936, prior to the reduction thereof, to approximately \$644,732.27; that under the terms of said plan, said deferred obligations were reduced by either 10% or 15% depending upon their classification, and the total amount of said obligations, as so reduced, amounted on March 24, 1936, to the sum of \$568,606.82 (and not \$549,317.04); and that payment of said obligations as so reduced was deferred for a period of five years with option in debtor to defer for an additional period as more fully provided in said plan of reorganization.

V.

That it is not true that from March 24, 1936, to March 17, 1941, petitioners Mayman, Moores, Price, and Bassick, together with A. E. Webber, were con-

tinuously the duly appointed, [88] qualified, and acting Directors of Hendy Co., and as such became the Voting Trustees of the 50% of the outstanding stock of the company which was retained by its stockholders under paragraph 6G1 of said plan, and as such Directors and Voting Trustees proceeded to carry the plan into effect and subsequently conduct and continuously manage and supervise the business of Hendy Co.; but, on the contrary, it is true that on March 24, 1936, the business and affairs of Hendy Co. were managed and operated by W. R. Bassick, Trustee, appointed and acting pursuant to order of the above entitled court until the discharge of said Trustee in the above entitled proceedings; that petitioners and defendants Mayman and Price became the duly appointed, qualified, and acting Directors of Hendy Co. on April 8, 1936, and continued as such Directors until March 17, 1941; that petitioner and defendant Moores became a duly appointed, qualified, and acting Director of Hendy Co. on April 8, 1936, and has ever since continued and still is a Director of Hendy Co.; that petitioner and defendant Bassick became a duly appointed, qualified and acting Director of Hendy Co. on March 15, 1937, and continued as a Director until March 17, 1941; and that A. E. Webber became a duly appointed, qualified, and acting Director of Hendy Co. on March 15, 1937, and continued to act as such Director until his death at the end of 1940; that it is true that subsequent to April 8, 1936, the Board of Directors of Hendy Co., as it was

from time to time constituted, supervised the business and affairs of Hendy Co., and participated in effectuating the plan for its reorganization, and that said Directors were, during the time that they were Directors, Trustees pursuant to paragraph 6G of said plan of reorganization. [89]

VI.

That it is true that pursuant to the terms of said order dated March 24, 1936, the stockholders of Hendy Co. thereafter endorsed and delivered the outstanding stock held by them to the Board of Directors of said corporation to be held by said Board pursuant to the terms of said plan of reorganization and said order confirming the same; that upon such endorsement and delivery, said Board, as Voting Trustees issued their Voting Trust Certificates to each of said stockholders for 50% of the shares so deposited by such stockholders, and retained the remaining 50% of the shares so delivered by each stockholder, aggregating 2,212½ shares, pursuant to said plan and order, and free and clear of any claim, right, title, or interest therein by such stockholders or any of them; that the number of shares of stock so endorsed and delivered by respondent and plaintiff Shores was 607 shares, and by respondent Behneman was 1,244½ shares; that upon such endorsement and delivery, the Directors of Hendy Co. executed and issued in duplicate trustees' receipts and certificates evidencing ownership by respondent and plaintiff Shores of an aggregate

of 303½ shares, and by respondent Behneman of an aggregate of 622¼ shares, respectively, being 50% of the original shareholdings of said stockholders; that said shares so evidenced by said trustees' receipts and certificates were thereafter held by said Directors in trust, as provided in paragraph 6G1 of said plan of reorganization and pursuant to said paragraph and to the terms of said trustees' receipts and certificates, up to on or about December 20, 1940; that the other 50% of the original shareholdings of said Shores and Behneman were thereafter held by said Directors in trust under and pursuant to the provisions of paragraph 6G2 of said plan, until on or about December 20, [90] 1940, when they were distributed, pursuant to said plan, to the managing officers of Hendy Co., as hereinafter found.

VII.

That it is true that on March 24, 1936, debtor Hendy Co. was insolvent and had no net worth; that its plant and business were badly run-down and depleted; that its stock had no value and was worthless, and that the equity of its stockholders in the debtor was nil.

VIII.

That it is true that petitioners and defendants Hyland and Levit were from March 24, 1936, and continuously thereafter to November 15, 1940, employees of Hendy Co., occupying important executive positions, and that from and after April 22,

1936, said petitioners and defendants were managing officers of Hendy Co., to wit, petitioner and defendant Hyland was vice president in charge of manufacturing, and petitioner and defendant Levit was vice president in charge of sales; that petitioner and defendant Bassick was on March 24, 1936, and thereafter and until his discharge, Trustee for Hendy Co. in the above entitled proceedings, and as such in the general management and operation of its business and affairs, and from and after March 15, 1937, a managing officer of Hendy Co., to wit, its president, and that during all of said period from March 24, 1936, to November 15, 1940, petitioner and defendant Bassick was the chief executive of the business and affairs of Hendy Co.

IX.

That it is true that subsequent to March 24, 1936, the officers and management of Hendy Co. so managed the plant, affairs, and business of said corporation that said plant, affairs and business became, and were, on and prior to November 15, 1940, [91] and on and prior to December 20, 1940, successfully rehabilitated, sound, businesslike, and satisfactory in condition, and improved from the point where the stockholders of petitioner corporation had no equity, as found hereinabove, to a point where the equity of said stockholders was, on and prior to November 15, 1940, and on and prior to December 20, 1940, very substantial; that it is not true that the term "successful rehabilitation" as used in

paragraph 6G2 of said plan of reorganization contemplated full payment of the reduced and deferred obligations covered by said plan, out of earnings of Hendy Co. derived from the operation of its business as a going concern, to the end that the capital assets thereof might be preserved for the benefit of its stockholders, or to the end that the control or management of the affairs of said corporation as a going concern or otherwise might be ultimately or at all returned to said stockholders, or to any other end whatever; that it is not true that said term "successful rehabilitation" as used in paragraph 6G2 of said plan did not contemplate payment of said reduced and deferred obligations, or any part thereof, out of proceeds of the sale of all or any of the debtor's operating capital assets or the corporate name or goodwill of Hendy Co., followed by a winding up and dissolution of said corporation; that it is not true that the affairs of Hendy Co. have not been successfully or at all rehabilitated. On the contrary, it is true that the business and affairs of Hendy Co. were successfully rehabilitated on and prior to November 15, 1940, and were at said times and on December 20, 1940, successfully rehabilitated within the provisions of the plan of reorganization, and particularly paragraph 6G2 thereof.

X.

That it is true that from March 24, 1936, and to [92] November 15, 1940, no dividends were paid or declared upon any of the outstanding stock of

Hendy Co.; that no dividends were paid or declared upon any of the outstanding stock of Hendy Co. at any time prior to March 24, 1936; that it is not true that said corporation has not, at any time since March 24, 1936, been financially in a condition which would permit of the payment of dividends; that it is true that on November 15, 1940, there still remained unpaid more than \$200,000 of the reduced and deferred obligations covered by said plan of reorganization; that it is true that subsequent to November 15, 1940, all of the unpaid reduced and deferred obligations covered by said plan of reorganization were fully paid; that it is true that such payment was made, in part, with cash derived from the sale of capital assets of Hendy Co. hereinafter referred to, but it is not true that the Directors of Hendy Co. were forced to resort thereto, and it is true that at the times of such payment the current assets of Hendy Co., irrespective of the proceeds from said sale, were materially in excess of the unpaid balance of said reduced and deferred obligations.

XI.

That it is true that between March 24, 1936, and November 15, 1940, petitioners and defendants Hyland and Levit, as employees and managing officers of Hendy Co., and petitioner and defendant Bassick, as Trustee and as an employee and managing officer of Hendy Co., received salaries and bonuses which were partial compensation, but only partial compensation, for their services to Hendy

Co. during said period; and it is not true that said salaries and bonuses fully or adequately compensated, or that they were intended to fully compensate, said petitioners and defendants for their services to said corporation during said [93] period.

That it is true that on or about December 4, 1940, the Board of Directors and Hendy Co. made a cash distribution to various of its officers and employees, including petitioners and defendants Bassick, Hyland, and Levit, as employees and managing officers of Hendy Co.; that said cash distribution to petitioners and defendants Bassick, Hyland, and Levit was made, inter alia, as partial compensation for their services to said corporation, and in the following amounts: To Bassick, \$40,000; to Hyland \$20,000; and to Levit, \$20,000; but that it is not true that said cash distribution, either taken alone or together with the salaries and bonuses hereinabove in this paragraph referred to, either fully or adequately compensated said petitioners and defendants for their services to Hendy Co.

XII.

That it is true that the aforesaid successful management and successful rehabilitation of the affairs of Hendy Co. has been had pursuant to arrangements and agreements made with said corporation's managing officers immediately upon the giving and making of said order dated March 24, 1936; that, notwithstanding the value of such services to said corporation, the compensation of said managing

officers was, by reason of such arrangements and agreements, not commensurate therewith; and that by said arrangements and agreements, and at divers intervening times, Hendy Co. represented to said managing officers that such compensation so received by them would be supplemented by cash bonuses or distributions and by the distribution of capital stock of said corporation, and that as a reward and partial compensation for their management and successful rehabilitation of said corporation's affairs, said corporation's Board of Directors as aforesaid [94] would distribute said capital stock of said corporation so held by said Board for said purpose pursuant to the terms of said order dated March 24, 1936; that petitioners and defendants Bassick, Hyland, and Levit were at all times mentioned herein the managing officers of Hendy Co., and they and each of them were fully advised of the terms of said order dated March 24, 1936, and from and after said date acted in the light thereof and in reliance thereon; and that all of Hendy Co.'s creditors and stockholders, including respondent and plaintiff Shores and respondent Behneman, and each of them, have acquiesced in and have accepted benefits and advantages provided to them by said order and by the actions and proceedings taken and had by Hendy Co. and its Board of Directors pursuant thereto.

XIII.

That it is true that on or about November 4, 1940, Hendy Co. granted an option to MacDonald &

Kahn, Inc., for the sale of certain of its assets and primarily the Sunnyvale, California, plant and equipment of Hendy Co., which properties represented the principal and all operating assets of said corporation; that on November 15, 1940, Felix Kahn, Trustee (assignee of MacDonald & Kahn, Inc.), exercised said option and purchased said properties for the amount of \$426,000, subject to adjustments to be made in connection with inventory, work then in progress, and other incidental matters; that it is true that said sale has been consummated but it is not true that the full purchase price has been adjusted and paid; that since its incorporation in 1906, Hendy Co. has been, and continuously up to on or about November 15, 1940, was, engaged in the general foundry and metal products manufacturing business, with the production department of its business being conducted during more recent [95] years at said Sunnyvale plant; that by reason of the sale of the principal and all of the operating assets of said corporation, namely, the said Sunnyvale plant and equipment, the continuation of said corporation in said business was rendered inadvisable; that it is not true that said sale rendered the continuation of Hendy Co. in said or any business impossible.

XIV.

That it is true that on December 20, 1940, pursuant to the order, authority, and direction of said order dated March 24, 1936, as aforesaid, the Board

of Directors of Hendy Co., in special meeting duly assembled, and in the proper exercise of the sole discretion invested in said Board by said order, unanimously adopted the following resolution (Director W. R. Bassick, however, expressly not participating in said vote):

“Whereas, under the terms of the confirmed plan of reorganization of this corporation and the Voting Trust created pursuant thereto, 2212½ shares of the capital stock of this corporation are now held by this Board, as Voting Trustees, free and clear of any claim, right, title, or interest therein by the former stockholders surrendering the same, and subject to the distribution by this Board, in its sole discretion, either in whole or in part to the managing officers of this corporation as a reward for their management and the successful rehabilitation of the corporation’s affairs; and

Whereas, the officers of this corporation hereinafter named have, since its reorganization, rendered extremely valuable services to, and in the management of, the corporation, resulting in its rehabilitation as a sound and going business, and the improvement of the financial condition of the corporation from a point where the stockholders of the corporation had no equity, as evidenced by the records of the reorganization of the corporation under Section 77B of the Bankruptcy Act, to a point where the equity of the stockholders has become very substantial; and

Whereas, the financial position, business, and affairs of this corporation have, since its reorganization, evidenced steady and substantial improvement to the point that they have become [96] rehabilitated, sound, business-like, and satisfactory in condition, and such rehabilitation of the corporation's business so occasioned has made possible the advantageous sale of the Sunnyvale plant and properties of the corporation just consummated; and

Whereas, notwithstanding the value of such services to this corporation, the compensation of such officers has not been commensurate therewith, and this Board through its Directors, has repeatedly represented to such officers that the compensation received by them during said period would be supplemented by additional reward as soon as in the opinion of the Board such further reward was practical and expedient; and

Whereas, in addition, due to the sale of the corporation's Sunnyvale plant and properties, the employment of certain of said officers has necessarily been severed, and their vacation and other rights interfered with; and

Whereas, it appears just and proper that said 2212½ shares of the capital stock of this corporation held by this Board, as aforesaid, be issued to said managing officers, subject to the condition hereinafter set forth, as a reward for their successful management and rehabili-

tation of the corporation's affairs; and it appears to be for the best interests of this corporation that the following resolution be adopted;

Now Therefore, Be It Resolved, that this Board forthwith distribute said 2212 $\frac{1}{2}$ shares of the capital stock of this corporation so held by it to the following persons in the respective amounts hereinafter set forth, in recognition, appreciation, payment, and reward for their exemplary and valuable services to this corporation and as a reward for their management and the successful rehabilitation of the corporation's affairs:

W. R. Bassick 812 $\frac{1}{2}$ shares

E. M. Hyland 700 shares

M. Levit 700 shares;

provided, however, that each such person shall, prior to, and as a condition precedent to, receiving such distribution of stock, waive in writing the right of such person to receive any dividends or distribution upon said stock out of the first \$85,848.75 available for dividends or distribution upon the capital stock of this corporation, in dissolution or otherwise, so that the said sum of \$85,848.75 may be prorated and paid by way of dividend, distribution, or otherwise (or set aside for such payment), only to the holders of the remaining 1907 $\frac{3}{4}$ shares of the outstanding stock of the corporation now held [97] by this Board as Voting Trustees, to the end that said persons holding said 2212 $\frac{1}{2}$

shares hereby distributed shall only participate in dividends or distributions upon the capital stock of this corporation made in excess of said sum of \$85,848.75, as aforesaid.

And Be It Further Resolved, that the President or Vice-President and the Secretary or Assistant Secretary of this corporation be and they are hereby authorized and directed, for and on behalf of this Board, to take all such steps and to execute all such documents as may be necessary or desirable to effectuate the distribution, transfer, and delivery of said stock to said officers, as aforesaid, and to fully effectuate the purposes of this resolution.”

XV.

That it is true that pursuant to the aforesaid resolution and to the terms of said order dated March 24, 1936, the said 2,212½ shares of the capital stock of Hendy Co., so held by said Board of Directors, as Trustees, were duly and regularly distributed to the said managing officers of Hendy Co. as a reward for their management and said successful rehabilitation of the affairs of said corporation, to wit: 812½ of said shares were distributed to petitioner and defendant Bassick; 700 shares were distributed to petitioner and defendant Hyland; and 700 shares were distributed to petitioner and defendant Levit; that said shares were so distributed to the said managing officers of Hendy Co. by its Board of Directors, in the proper exercise of

the sole discretion of said Board as a reward and partial compensation for their management of the affairs of said corporation so that such affairs had become, and petitioners and defendants Mayman, Moores, Price, and Bassick, and A. E. Webber (now deceased), as the Board of Directors of said corporation, in the exercise of their sole discretion found them to be, successfully rehabilitated, sound, businesslike, and satisfactory in condition; and that said shares were so distributed in express [98] compliance with, and in the exercise and enforcement of, the order, authority, and direction of said order dated March 24, 1936, and not otherwise; and that by so distributing said stock to said managing officers, said Board of Directors was thereby enforcing and effectuating, and did thereby enforce and effectuate, the authority and direction of said order confirming the said plan of reorganization, and was thereby securing and preserving and did thereby secure and preserve the fruits and advantages thereof and carry the same into effect; that it is not true that petitioners and defendants Mayman, Moores, Price, and Bassick, and said A. E. Webber, as the Directors of said corporation, and Trustees aforesaid, or in any other capacity, had no right or discretion in the matter of distributing said 2,212½ shares of stock, or any of said shares, to petitioners and defendants Bassick, Hyland, and Levit, as the managing officers of said corporation, either pursuant to paragraph 6G2 of said plan of reorganization or otherwise, or that

said share distribution was therefore, or for any other reason, illegal or void.

That by reason and in consideration of the cash distribution to petitioners and defendants Bassick, Hyland, and Levit authorized to be made to them on December 4, 1940, as hereinabove found, and so as to approximately equalize the amounts to be received by the remaining stockholders by way of liquidating dividends, the Board of Directors of Hendy Co. distributed said 2,212½ shares to said managing officers upon the express condition that said managing officers waive, and said managing officers did waive, any and all right to receive any dividends or distribution upon said stock so distributed to them out of the first \$85,848.75 available for dividends or distribution upon the capital stock of Hendy Co., in dissolution or otherwise; [99] and said shares were so distributed to said managing officers upon the terms, and only after the execution in writing by each of them, of the waivers provided for in said resolution, so that the sum of \$85,848.75 might be prorated and paid by way of dividend, distribution, or otherwise, to the remaining stockholders of Hendy Co., including respondent Behneman, and plaintiff and respondent Shores, but without waiving the right of said managing officers to participate in dividends or distributions upon said capital stock made in excess of said sum of \$85,848.75.

XVI.

That it is true that the salaries, and bonuses, paid to and received by petitioners and defendants Bassick, Hyland, and Levit between March 24, 1936, and November 15, 1940, and the cash distribution made to and received by said petitioners and defendants pursuant to resolution of the Board of Directors dated December 4, 1940, and the 2,212½ shares of stock of Hendy Co. distributed to said petitioners and defendants pursuant to the terms and provisions of said order dated March 24, 1936, taken together constituted, and constitute, a fair, reasonable, and proper compensation to said petitioners and defendants for the services rendered by them to Hendy Co. as employees and managing officers of said corporation between March 24, 1936, and November 15, 1940; that it is not true that said payments and stock distribution, or any part thereof, constituted or was an excessive or unreasonable or improper compensation to said petitioners and defendants or any of them.

XVII.

That it is true that on or about November 23, 1940, and prior to the distribution of said 2,212½ shares of stock to petitioners and defendants Bassick, Hyland, and Levit, as [100] aforesaid, respondent Behneman notified petitioners and defendants Mayman, Moores, Price, and Bassick, and said A. E. Webber, as the then Directors of Hendy Co., in writing, that in his opinion the affairs of Hendy Co. had not been successfully rehabilitated,

and requested that he (Behneman) be notified by said Directors in advance of any such stock distribution to managing officers of Hendy Co. in order that he (Behneman) might take appropriate action to protect his rights and interests; that it is true that, notwithstanding respondent Behneman's said notification and request, and without any prior notification to him, said 2,212½ shares were distributed to petitioners and defendants Bassick, Hyland, and Levit, as aforesaid; that it is not true that such distribution was without any authorization, permission, or consent on the part of the above entitled court first had and obtained, but that it is true that such distribution was made pursuant to the order, authority, and direction of said plan and of said order dated March 24, 1936.

XVIII.

That it is true that on or about December 21, 1940, proceedings for the winding up and dissolution of Hendy Co. were commenced by the adoption of the resolution by the vote of persons entitled to vote and holding shares representing more than 50% of the voting power of all of the outstanding capital stock of said corporation, stating the election of said corporation and its stockholders to wind up its affairs and voluntarily dissolve; that on or about December 21, 1940, notice of the commencement of such dissolution proceedings was mailed by petitioner and defendant Mayman, as secretary of said corporation, to respondents Shores and Behne-

man and to all other stockholders and holders of Voting Trustees' receipts and certificates of said [101] corporation, which said notice was received by said respondents on or about December 23, 1940; that all of the said proceedings for the winding up and dissolution of Hendy Co. were duly and regularly commenced, taken, and had.

XIX.

That it is true that on December 21, 1940, at a duly and regularly called meeting of the Board of Directors of Hendy Co., said Board declared a first liquidating dividend of \$45 per share in favor of respondents Shores and Behneman and of the other holders of all of the then outstanding trustees' receipts and certificates issued pursuant to paragraph 6G1 of said plan of reorganization; that on said date there were outstanding trustees' receipts and certificates evidencing ownership of a total of 1907 $\frac{3}{4}$ shares of the capital stock of said corporation, 303 $\frac{1}{2}$ of which then were and now are owned by respondent Shores and 622 $\frac{1}{4}$ of which then were and now are owned by respondent Behneman; that in declaring said first liquidating dividend of \$45 per share as aforesaid, said Board of Directors specifically excluded from participation therein the 2,212 $\frac{1}{2}$ shares of stock previously distributed to petitioners and defendants Bassick, Hyland, and Levit as aforesaid; that on December 21, 1940, petitioners and defendants Mayman, Moores, Price, and Bassick, together with said A. E. Webber, act-

ing as Directors and also as Trustees, under the said plan of reorganization and pursuant to it and to the said order dated March 24, 1936, proceeded to and did duly and regularly terminate the voting trust created by paragraph 6G1 of said plan of reorganization; that it is not true that in so terminating said voting trust, the said parties acted wholly as the Directors of Hendy Co. [102]

XX.

That it is true that petitioners and defendants Mayman, Moores, Price, and Bassick, together with said A. E. Webber, as the Directors of Hendy Co., and as individuals, have heretofore contended, and said petitioners and defendants do now contend that the affairs of said corporation have been successfully rehabilitated; that in accordance with this contention and pursuant to paragraph 6G2 of said plan of reorganization and said order dated March 24, 1936, they have distributed to petitioners and defendants Bassick, Hyland, and Levit, as the managing officers of said corporation, said 2,212½ shares of stock of said corporation, as hereinbefore found; that by reason of such distribution, all of the individual petitioners have contended and do now contend, and the court now finds, that it is true that petitioners and defendants Bassick, Hyland, and Levit, as the owners of said shares of stock, will be and are entitled to receive future liquidating dividends declared by said corporation, upon an equal pro rata basis with respondents Shores and

Behneman and the present stockholders of Hendy Co., including the stockholders who, under the provisions of paragraph 6G of said plan of reorganization, were required to and did surrender said 2,212½ shares to the Trustees thereunder; that petitioner and defendant Hendy Co. and the members of its Board of Directors should cause future liquidating dividends declared by Hendy Co. to be paid to said petitioners and defendants Bassick, Hyland, and Levit, upon said 2,212½ shares now held by them, upon an equal pro rata basis with respondents Shores and Behneman and the other stockholders of said corporation; that it is not possible to determine at this time what amounts will hereafter be available for distribution by Hendy Co. to its shareholders [103] as liquidating dividends; that it is not true by reason of any facts whatever that petitioner and defendant Hendy Co., or its present Board of Directors, have no right to cause any liquidating dividends hereafter declared by Hendy Co. in favor of its stockholders to be paid to said petitioners and defendants Bassick, Hyland, and Levit, on said 2,212½ shares heretofore distributed to and now held by them as aforesaid; that it is not true by reason of any facts whatever that any or all of such liquidating dividends should be declared only in favor of or should be only paid to respondents Shores and Behneman and the other owners and holders of the 1,907¾ shares of stock of said corporation, which, from March 24, 1936, to December 21, 1940, were subject to the voting trust created by said plan of reorganization.

XXI.

That it is true that notwithstanding the terms and provisions of said order dated March 24, 1936, and said action by said Board of Directors of Hendy Co. pursuant thereto and in the enforcement thereof, and on or about January 6, 1941, respondent Behneman, one of the stockholders of said corporation, instituted an action in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled "Harold M. F. Behneman, plaintiff, vs. Hendy Realization Co., et al., defendants," and numbered therein 299573; and on or about January 17, 1941, respondent Shores instituted an action in said Superior Court entitled "Gladys M. Shores, plaintiff, vs. Hendy Realization Co., et al., defendants," and numbered therein 299911; and on or about February 25, 1941, respondent Behneman instituted an action in said Superior Court, entitled "In the Matter of the Voluntary Winding Up and Dissolution of Hendy Realization Co., a corporation," and numbered therein 300741; that in each of said [104] actions so filed in said Superior Court, Messrs. Byrne, Lamson & Jordan, of San Francisco, California, appear as the attorneys of record for the respective plaintiffs; and that said actions, and each of them, are still pending in said Superior Court; that said respondents, in each of said actions, numbered 299573 and 299911 seek to have it declared by said Superior Court: That the distribution of said 2,212½ shares to petitioners and defendants Bassick, Hy-

land, and Levit, the managing officers of Hendy Co., in compliance with said order dated March 24, 1936, as aforesaid, was illegal and void,—that said managing officers, and each of them, be ordered to surrender said shares back to Hendy Co., and that said shares be cancelled and retired,—that the Directors of Hendy Co. be required to account for said 2,212½ shares of stock so distributed as aforesaid, together with all dividends thereon,—and that Hendy Co. and its said Directors be permanently restrained and enjoined from declaring or paying any liquidating or other dividends or payments from the assets of Hendy Co. to petitioners Bassick, Hyland, and Levit as stockholders holding said 2,212½ shares so distributed. That in and by said actions said respondents moreover seek to have said Superior Court construe and interpret the terms and provisions of said order dated March 24, 1936, particularly with reference to the distribution of said stock as aforesaid, and seek to have said Superior Court declare and determine the rights and duties of the parties thereunder and the nature, extent, and effect of said order dated March 24, 1936; and that said actions all grow out of, relate to, and involve the proceedings for the reorganization of Hendy Co., one of the above entitled consolidated causes. [105]

XXII.

That it is true that the jurisdiction of the above entitled court in the premises and in the subject matter of the above entitled proceedings and in the

interpretation, construction, effectuation, and enforcement of its said order dated March 24, 1936, is sole and exclusive; that said actions instituted as aforesaid by said respondents in said Superior Court, and each of said actions, constitute and are an unwarranted and improper attack and attempted infringement of said sole and exclusive jurisdiction of the above entitled court and of its said order, and constitute and are an unwarranted and improper attempt to prevent and interfere with the enforcement and effectuation of said order and decree and to defeat said order and decree, its purposes, and the rights and advantages adjudged and granted thereby.

XXIII.

That it is true that said respondents, and each of them, threaten to continue and prosecute said actions in said Superior Court unless restrained and enjoined therefrom; that, unless restrained and enjoined from so doing by the above entitled court, respondents and each of them will proceed with the prosecution of said actions and the taking of other actions designed to interfere with and defeat the terms, purpose, and enforcement of said order dated March 24, 1936, and will seek to prevent and nullify the enforcement and effectuation thereof; that petitioners have no adequate remedy at law, and that such actions and attack upon the said order of the above entitled court are of such nature as to cause, unless restrained, great immediate and irreparable injury to petitioners, and to defeat the

terms and spirit of said order and decree dated March 24, 1936; that this is a proper case for the above entitled court to issue its [106] injunction permanently enjoining the continuance of said actions by respondents in the said Superior Court, in aid of and to enforce and effectuate its own said order and decree dated March 24, 1936, and to secure and preserve the fruits and advantages thereof and to prevent the same from being defeated.

XXIV.

That it is true that an actual controversy has arisen between the parties hereto with respect to the meaning and interpretation of the provisions of paragraph 6G2 of said plan of reorganization, the title to and disposition of the said 2,212½ shares of stock of Hendy Co. heretofore distributed to and now held by petitioners and defendants Bassick, Hyland, and Levit, as aforesaid, and with respect to the future distribution of liquidating dividends hereafter declared by Hendy Co. in favor of its stockholders.

XXV.

That the facts recited and the findings of fact contained in the certificate and report of the Special Master filed herein on March 28, 1941, and a part of the records and files of the above entitled court in the above entitled proceedings, hereby specially referred to and incorporated by reference, are true and correct. [107]

CONSOLIDATED CONCLUSIONS OF LAW

From the foregoing facts the court concludes, and draws and finds the following consolidated conclusions of law:

1. That the jurisdiction of the above entitled court in the premises and in the subject matter of, and over the persons of Behneman and Shores in, the above entitled consolidated causes, and each of them, and in the interpretation, construction, effectuation, and enforcement of, its said order dated March 24, 1936, is sole and exclusive; and that the certificate and report of the Special Master filed in the above entitled proceedings on March 28, 1941, so reporting, should be approved and confirmed. That the various actions instituted by Behneman and Shores in the Superior Court of the State of California, in and for the City and County of San Francisco, referred to in the foregoing consolidated findings of fact, and each of said actions, constitute and are an unwarranted and improper attack and attempted infringement of the sole and exclusive jurisdiction of the above entitled court and its order, and constitute and are an unwarranted and improper attempt to prevent and interfere with the enforcement and effectuation of said order and decree, and to defeat said order and decree, its purposes, and the rights and advantages adjudged and granted thereby.

2. That the affairs of Hendy Co. were on and prior to both November 15, 1940, and December 20, 1940, successfully rehabilitated, and that such suc-

cessful rehabilitation of its affairs was the result of the valuable services rendered, and management accorded to it, by its managing officers Bassick, Hyland, and Levit.

3. That said managing officers Bassick, Hyland, and [108] Levit were entitled to reasonable compensation for their said services rendered to Hendy Co., and that the salaries, bonuses, and cash and stock distributions to them, referred to in the foregoing consolidated findings of fact, taken altogether, constituted, and constitute, a fair, reasonable, and proper compensation, and no more than a fair, reasonable, and proper compensation, to said managing officers for the services rendered by them to Hendy Co., as employees and managing officers of said corporation between March 24, 1936, and November 15, 1940; that the distribution by the Board of Directors of Hendy Co., as Trustees, to said managing officers Bassick, Hyland, and Levit of 2,212½ shares of the capital stock of Hendy Co., referred to in the foregoing consolidated findings of fact, was reasonable, proper, and in all respects in full and proper compliance with the plan of reorganization of Hendy Co., and the order of the above entitled court dated March 24, 1936, approving and confirming the same; and that the proceedings and actions of the Directors and the Board of Directors of Hendy Co., with respect to the compensation of, and said salaries, bonuses, and cash and stock distributions to, said managing officers, and the proceedings and actions of the Board of Directors of

Hendy Co., taken subsequent to the confirmation of said plan of reorganization, referred to in the foregoing consolidated findings of fact, were due, reasonable, and proper and should be ratified, approved, and confirmed.

4. That the petitions filed in the above entitled cause numbered 25937-S are good and sufficient; that this is a proper case for the above entitled court to issue its injunction permanently enjoining the continuance of the actions and proceedings instituted by Behneman and Shores in the Superior Court [109] of the State of California, in and for the City and County of San Francisco, referred to in the foregoing consolidated findings of fact in aid of, and to enforce and effectuate by injunction, the order and decree of this court dated March 24, 1936, and to secure and preserve the fruits and advantages thereof, and to prevent the same from being defeated; and that petitioners in said petitions are entitled to recovery in accordance with the prayers of said petitions, and that the temporary restraining order of this court dated March 11, 1941, should be made absolute and permanent.

5. That the motions of Behneman and Shores, and each of them, to dismiss said petitions, and to vacate the restraining order of the above entitled court dated March 11, 1941, are without merit and should be denied; that the complaint and action of plaintiff and respondent Shores in the above entitled cause numbered 21792-S is without merit and plaintiff and respondent Shores should take nothing

by reason thereof; and that the answer and cross-complaint of plaintiff and respondent Shores and respondent Behneman to the said petitions dated February 19, 1941, and March 11, 1941, are without merit and that said plaintiff and respondents should take nothing by reason thereof.

6. That the report of the Special Master dated September 26, 1941, relating to compensation and expenses of said Special Master, should be approved and confirmed, and said Special Master should be allowed the sum of \$100 as compensation for his services, and the further sum of \$20 for his office and clerical expenses, and that said sums should be paid by petitioners and taxed as costs against respondents Behneman and Shores, and each of them. That, in addition, in consideration of the proceedings in the above consolidated causes, the costs of the debtor, [110] petitioners, and defendants should be borne by, and taxed against, respondents Behneman and Shores, and each of them.

7. Let judgment be entered accordingly.

Done in open court this 15th day of November, 1941.

A. F. ST. SURE

Judge of the United States
District Court

[Endorsed]: Filed Nov. 15, 1941. [111]

In the District Court of the United States for the
Northern District of California, Southern Division

No. 25937-S

In the Matter of

THE JOSHUA HENDY IRON WORKS
(whose name has been changed to HENDY
REALIZATION CO.), a corporation,
Debtor.

HENDY REALIZATION CO. (formerly THE
JOSHUA HENDY IRON WORKS), a cor-
poration, A. J. MAYMAN, C. B. MOORES,
E. H. PRICE, W. R. BASSICK, E. M.
HYLAND, and MORRIS LEVIT,
Petitioners,

vs.

HAROLD M. F. BEHNEMAN and GLADYS M.
SHORES,
Respondents.

No. 21792-S

GLADYS M. SHORES,
Plaintiff,
vs.

HENDY REALIZATION CO., a corporation
(formerly THE JOSHUA HENDY IRON
WORKS), A. J. MAYMAN, C. B. MOORES,
E. PRICE, A. E. WEBBER and W. R. BAS-
SICK, individually and as the Directors of
Hendy Realization Co., ELMER M. HYLAND,
MORRIS LEVIT, FIRST DOE, SECOND
DOE and THIRD DOE,
Defendants.

JUDGMENT [112]

The above entitled causes and the pending proceedings therein, having been consolidated by stipulation of the parties and the order of the above entitled court duly given and made, came on regularly for trial in the above entitled court on the 23rd day of September, 1941, before the Honorable A. F. St. Sure, Judge, presiding, without a jury, plaintiff and respondent Gladys M. Shores and respondent Harold M. F. Behneman appearing by their counsel, Byrne, Lamson & Jordan, by Paul S. Jordan, Leo D. Byrne, and John W. Skinner; debtor, petitioner and defendant The Joshua Hendy Iron Works (whose name has been changed to Hendy Realization Co.), petitioners and defendants A. J. Mayman, C. B. Moores, E. H. Price, and W. R. Bassick, individually, and as Directors of Hendy Realization Co., and petitioners and defendants Elmer M. Hyland and Morris Levit appearing by their counsel, Stanley Pedder and Kenneth Ferguson, Pillsbury, Madison & Sutro, and Long & Levit, by Kenneth Ferguson, Gerald S. Levin, and Bert W. Levit; and it being stipulated that no relief of any sort was sought against defendant A. E. Webber, deceased, either individually or as Director of Hendy Realization Co.; and after trial on that date and on September 24, 25, 26, and 30, 1941, and the introduction and receipt of evidence, both oral and documentary, on behalf of the respective parties, and the causes consolidated by the court having been argued and submitted to the court for its decision, and the court having before it the records

and files in the above entitled causes and having considered the evidence adduced and the arguments of counsel, and being fully advised in the premises, having made in writing and filed its consolidated findings of fact and consolidated conclusions of law; and the court having directed that judgment be and it is hereby entered in accordance therewith; [113]

Now therefore, by reason of the law and the findings and decision aforesaid;

It is ordered, adjudged and decreed:

1. That the certificates and reports of the Special Master filed in the above entitled cause on March 28, 1941, and September 26, 1941, be, and each of them is hereby, approved and confirmed; and said Special Master, the Honorable Burton J. Wyman, is allowed the sum of one hundred dollars (\$100) as compensation for his services as Special Master, and the further sum of twenty dollars (\$20) for his office and clerical expenses, said sums to be paid by petitioners and defendants and taxed as costs against respondents Gladys M. Shores and Harold M. F. Behneman.

2. That the motions of respondents Harold M. F. Behneman and Gladys M. Shores, and each of them, to dismiss petitioners' petitions filed herein on February 19, 1941, and March 11, 1941, and to vacate the restraining order of the above entitled court duly given and made on March 11, 1941, be, and the same hereby are, denied.

3. That plaintiff and respondent Gladys M. Shores take nothing by reason of her above entitled

cause, No. 21792-S, removed to this court and filed herein on February 25, 1941, and that defendants therein, and each of them, do hereby have judgment therein against said plaintiff and respondent Gladys M. Shores.

4. That the temporary restraining order of this court dated March 11, 1941, be, and the same is hereby, made permanent and absolute, and Harold M. F. Behneman and Gladys M. Shores, and each of them, and their respective attorneys, agents, and servants, be, and they are hereby, jointly and severally restrained [114] and enjoined from proceeding or taking any further proceedings in those certain actions and proceedings instituted in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled and numbered therein as follows:

(1) That certain proceeding numbered therein 299573, entitled "Harold M. F. Behneman, plaintiff, v. Hendy Realization Co., et al., defendants";

(2) That certain proceeding numbered therein 299911, entitled "Gladys M. Shores, plaintiff, v. Hendy Realization Co., et al., defendants," and removed to this court and filed herein on February 25, 1941, and numbered herein 21792-S; and

(3) That certain proceeding numbered therein 300741, entitled "In the Matter of the Voluntary Winding Up and Dissolution of Hendy Realization Co., a corporation," which said ac-

tion is brought on the petition of Harold M. F. Behneman;

and/or from taking or doing any and all acts and/or from the commencement or continuation of any and all proceedings interfering with or attacking the order of the above entitled court dated March 24, 1936, or the enforcement thereof, and/or the distribution of 2,212½ shares of the capital stock of Hendy Realization Co., to the managing officers of said corporation pursuant thereto and/or the rights of petitioners and defendants W. R. Bassick, E. M. Hyland, and Morris Levit, the distributees of said capital stock and/or the distribution of salaries, bonuses, and cash to petitioners and defendants W. R. Bassick, Elmer M. Hyland, and Morris Levit and that respondents Harold M. F. Behman and Gladys M. Shores, and each of them, take nothing by their answer and cross-complaint to the petitions filed in the above entitled cause on February 19, 1941, and on March 11, 1941, and that debtor, petitioners, and defendants do have judgment thereon against said respondents, and each of them.

5. That debtor, petitioners, and defendants, and each [115] of them, do have and recover from plaintiff and respondent Gladys M. Shores and respondent Harold M. F. Behneman, and each of them, the sum of one hundred and twenty dollars (\$120), payable to the Special Master herein, as hereinabove provided, together with debtor's, petitioners' and defendants' costs and disbursements incurred

in the above entitled consolidated actions, and each of them.

Done in open court this 15th day of November, 1941.

A. F. ST. SURE

Judge of the United States
District Court

Receipt of service.

[Endorsed]: Filed Nov. 15, 1941. [116]

[Title of District Court and Cause—Nos. 25937-S,
21792-S.]

NOTICE OF APPEAL [117]

Notice is hereby given that Gladys M. Shores, plaintiff and respondent above named, and Harold M. F. Behneman, respondent above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled consolidated actions on November 15, 1941.

Dated: December 15, 1941.

BYRNE, LAMSON & JORDAN
PAUL S. JORDAN

Attorneys for appellants Gladys M.
Shores and Harold M. F. Behneman
1249 Russ Building
San Francisco, California

[Endorsed]: Filed Dec. 15, 1941. [118]

[Title of District Court and Cause—Nos. 25937-S,
21792-S.]

APPELLANTS' STATEMENT OF POINTS
UPON WHICH THEY INTEND TO RELY
ON APPEAL [119]

Appellants Gladys M. Shores and Harold M. F. Behneman herewith state the points upon which they intend to rely in their appeal from the judgment of the above entitled court given, made and entered herein on November 15, 1941, as follows:

1. That the United States District Court for the Northern District of California, Southern Division, was and is without jurisdiction over the entire subject matter and issues involved in the above entitled consolidated proceedings, and that said court accordingly erred in the making and entering of said judgment herein on November 15, 1941;

2. That the motion of appellant Gladys M. Shores to remand to the Superior Court of the State of California, in and for the City and County of San Francisco, the above action entitled "Gladys M. Shores, Plaintiff vs. Hendy Realization Co., a corporation, et al, Defendants", and herein numbered 21792-S, should have been granted for the reason that said suit is not one arising under the Constitution or laws of the United States and accordingly does not involve a "federal question" (that said suit was one arising under the Constitution or laws of the United States constituted the sole ground urged by appellees for removal thereof from said

Superior Court to the above entitled court); and for the further reason that said suit is not one within the original and exclusive jurisdiction of the above entitled court, and that jurisdiction thereof had already attached in said Superior Court prior to its removal to the above entitled court upon the petition of appellees. For said reasons, the motion of appellant Gladys M. Shores to remand said suit to said Superior Court should accordingly have been granted, and the above entitled court erred in denying the same and in making and entering said judgment filed herein on November 15, 1941;

3. That the motion of appellants Gladys M. Shores and [120] Harold M. F. Behneman to dismiss appellees' petitions filed on February 19, 1941, and on March 11, 1941, in the above proceedings entitled "In the Matter of The Joshua Hendy Iron Works (whose name has been changed to Hendy Realization Co.), a corporation, Debtor; Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, et al, Petitioners, vs. Harold M. F. Behneman and Gladys M. Shores, Respondents", and herein numbered 25937-S, and to vacate the restraining order of the above entitled court given and made on March 11, 1941, should have been granted for the reason that said court lacks jurisdiction over the issues and subject matter referred to and described in said above mentioned petitions or to grant the relief prayed for in said petitions, or either of them. The above entitled court accordingly erred in denying appellants' said

motion to dismiss said petitions in its said judgment given, made and entered herein on November 15, 1941;

4. That the individual appellees are not proper parties to the above entitled proceedings numbered 25937-S for the reason that none of them have intervened in said proceeding in accordance with Rule 24 of the Rules of Civil Procedure for the District Courts of the United States.

Dated: December 23rd, 1941.

BYRNE, LAMSON & JORDAN
PAUL S. JORDAN

Attorneys for Appellants Gladys M.
Shores and Harold M. F. Behneman
1249 Russ Building
San Francisco, California

(Acknowledgment of service.)

[Endorsed]: Filed Dec. 23, 1941. [121]

[Title of District Court and Cause—Nos. 25937-S
and 21792-S.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL [122]

Appellants Gladys M. Shores and Harold M. F. Behneman hereby designate that the following portions of the record, proceedings and evidence herein are to be contained in the record on appeal pursuant to their notice of appeal filed herein, namely:

In the above action entitled “Gladys M. Shores, Plaintiff vs. Hendy Realization Co., a corporation, et al, Defendants”, and herein numbered 21792-S, the following true copies of portions of the record, proceedings and evidence therein are to be included:

1. Transcript of the record of said action in the Superior Court of the State of California, in and for the City and County of San Francisco, filed in the above entitled court by appellees on February 25, 1941, including plaintiff and appellant Shores’ complaint, and appellees’ petition for removal from said Superior Court to the above entitled court.

2. Appellant Shores’ motion to remand said action to said Superior Court.

3. Minute order of the above entitled court entered herein on March 24, 1941 denying appellant Shores’ said motion to remand.

4. Order consolidating case with proceeding No. 25937-S for trial, filed April 11, 1941.

5. Appellees’ answer to said complaint.

In the above proceedings entitled “In the Matter of The Joshua Hendy Iron Works (whose name has been changed to Hendy Realization Co.), a corporation, Debtor: Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, et al, Petitioners vs. Harold M. F. Behneman and Gladys M. Shores, Respondents”, and herein numbered 25937-S, the following true copies of portions of the record, proceedings and evidence therein are to be included: [123]

1. The Plan of Reorganization of The Joshua Hendy Iron Works approved by order of the above entitled court entered on March 24, 1936; also said order of March 24, 1936.

2. The order of the above entitled court given, made and entered herein on January 27, 1937 denominated "Final Decree, etc".

3. All pleadings and orders filed in said reorganization proceeding subsequent to January 27, 1937 and up to the date of entry of judgment herein on November 15, 1941, including:

(a) Appellees' petition filed on February 19, 1941 denominated "Petition for Order Aiding, Enforcing, Effectuating and Protecting the Adjudication, Order and Decree of the Above Entitled Court Confirming Plan of Reorganization and Directing Reorganization of the Debtor Pursuant Thereto and Preventing and Enjoining the Threatened Interference With and Defeat of Said Adjudication, Order and Decree and the Jurisdiction of the Above Entitled Court";

(b) Appellees' petition filed on March 11, 1941 denominated "Petition for Order Restraining and Staying Pending Actions";

(c) Temporary restraining order of the above entitled court made and entered on March 11, 1941 and denominated "Order Restraining and Staying Pending Actions";

(d) Motion of Appellants Shores and Behneman to dismiss the petitions referred to in

(a) and (b) *supra*, and to dissolve the temporary restraining order referred to in (c) *supra*, filed on March 17, 1941;

(e) Certificates and reports of Hon. Burton J. Wyman as Special Master, filed in the above entitled court on March 28, 1941, and on September 26, 1941, together with all exhibits and papers accompanying the said certificate [124] and report filed on March 28, 1941, the same being specifically described on pages 31 and 32 of said certificate and report, except certified copy of complaint in *Shores vs. Hendy Realization Co., et al*, S. F. Superior Court No. 299911 (which is referred to and included under Paragraph numbered 1, lines 10 to 15 on page 2 hereof), and except memorandums of authorities described in Paragraphs numbered (5), (6) and (7), appearing on page 32 of said last mentioned certificate;

(f) Objections of appellants to said certificate and report of said Special Master filed on March 28, 1941;

(g) Answer and cross-complaint of appellants to the petitions referred to in (a) and (b) *supra*;

(h) Appellees' answer to said cross-complaint.

With respect to records and documents common to all of the above entitled consolidated proceedings, the following true copies of portions of the records,

proceedings and evidence therein are to be included:

1. Minute order of Hon. A. F. St. Sure made and entered on September 30, 1941.
2. Notice of decision issued by the Clerk of the above entitled court on October 1, 1941.
3. Consolidated findings of fact and conclusions of law.
4. Judgment entered in said consolidated proceedings on November 15, 1941.
5. Appellants' notice of appeal, appellants' statement of the point on which they intend to rely on appeal, and this designation of contents of record on appeal.

Dated: December 23, 1941.

(Acknowledgment of Service)

BYRNE, LAMSON & JORDAN
PAUL S. JORDAN

Attorneys for Appellants
Gladys M. Shores and Har-
old M. F. Behneman
1249 Russ Building
San Francisco, California

[Endorsed]: Filed Dec. 23, 1941. [125]

[Title of Court and Cause.]

APPELLEES' DESIGNATION OF ADDITIONAL CONTENTS OF RECORD ON APPEAL

Appellees, pursuant to Rule 75 of the Rules of Civil Procedure, hereby designate the following additional portions of the record, proceedings, and evidence to be included in the record on appeal herein:

1. Complete transcript of the record of the action entitled *Shores vs. Hendy Realization Co., et al*, in the Superior Court of the State of California in and for the City and County of San Francisco; including, but not limited to, the pleadings specified in paragraph 1 (page 2) of appellants' Designation filed herein and dated December 23, 1941.

2. Motion to Dismiss Action and for More Definite Statement, and Notice of Motion appended thereto, dated February 28, 1941; on file herein in Action No. 21792-S.

3. Stipulation relating to the death of defendant Webber, dated April 21, 1941, and appended Order approving same; on file herein in Action No. 21792-S.

4. All pleadings and orders filed in the said reorganization proceeding (entitled "In the Matter of the Joshua Hendy Iron Works etc., a corporation, Debtor"; and Hendy Realization Co., et al, Petitioners, vs. Behenman, et al, Respondents; and numbered herein No. 25937-S) subsequent to Jan-

uary 27, 1937, and up to the date of entry of judgment herein on November 15, 1941; including but not limited to, the pleadings and orders specified in subparagraphs (a) to (h) of paragraph 3 (pages 3 and 4) of appellants' Designation filed herein and dated December 23, 1941.

5. Certificate and Report of Special Master Relative to the Confirmation of Plan of Reorganization and [126] Directing Reorganization of Debtor Corporation, dated February 19, 1936; on file herein in Action No. 25937-S.

6. The following items, referred to on pages 11 and 12 of the Certificate described in the preceding paragraph hereof, and designated in said Certificate as "Papers Handed Up Herewith":

(a) Objection of Harold M. F. Behenman, to plan of reorganization; being numbered No. 1 in said Certificate;

(b) Affidavit of mailing notice to stockholders, etc.; being numbered No. 6 in said Certificate;

(c) Acceptance of plan of reorganization by Gladys M. Shores; included in item numbered No. 7 in said Certificate;

(d) Transcript of proceedings held before the special master on October 22nd, 1935, etc.; being numbered No. 10 in said Certificate; together with transcript of further proceedings held before the special master on October 28, 1935;

(e) Transcript of proceedings held before the special master on December 30th, 1935; being numbered No. 11 in said Certificate.

7. Interrogatories propounded by the above

named plaintiff, Gladys M. Shores, and by the above named respondents, Gladys M. Shores and Harold M. F. Behneman, pursuant to Rule 33 of the Rules of Civil Procedure for the district courts of the United States, dated May 19, 1941, and on file herein.

8. Objections to interrogatories etc., dated May 29, 1941, and on file herein.

9. Minute Order dated June 23, 1941, passing upon the said Interrogatories and Objections thereto; and Notice of said Minute Order by the Clerk of this Court, dated June 23, [127] 1941.

10. Answers to Interrogatories, dated July 23, 1941, and on file herein.

11. The Reporter's Transcript made and taken at the trial of the above-entitled consolidated proceedings, containing all of the evidence and proceedings had at said trial.

12. All Exhibits admitted in evidence at the trial of the above entitled consolidated proceedings (either in original or by copy), which are not included in full in the reporter's transcript referred to in the preceding paragraph hereof.

Dated: San Francisco, January 2, 1942.

STANLEY PEDDER &
KENNETH FERGUSON
PILLSBURY, MADISON &
SUTRO
LONG & LEVIT

Attorneys for Appellees.

(Admission of Service)

[Endorsed]: Filed Jan. 2, 1942. [128]

[Title of District Court and Cause—Nos. 25937-S and 21792-S.]

APPELLANTS' SUPPLEMENTAL DESIGNATION OF CONTENTS OF RECORD ON APPEAL [129]

Appellants Shores and Behneman, in addition to the portions of the record, proceedings and evidence heretofore designated by them in their "Designation of Contents of Record on Appeal" filed on December 23, 1941, hereby further designate that there likewise be included in the record on appeal herein true copies of the following:

1. Any petition or petitions in intervention filed by or on behalf of the individual appellees, or any of them, in the above entitled cause numbered 25937-S (in which said individual appellees are referred to as "Petitioners"), from the commencement thereof in the above entitled court on or about March 4, 1935 up to the date of filing of appellants' Notice of Appeal on December 15, 1941;

2. Any order or orders of the above entitled court given, made and entered during the period referred to in Subdivision 1 hereof, permitting the intervention by said individual appellees, or any of them, as parties in and to said cause numbered 25937-S.

3. Order Directing Clerk Regarding Transmittal of Portions of Record on Appeal, dated January 29, 1942;

4. This Supplemental Designation of Contents of Record on Appeal.

Dated: January 29, 1942.

BYRNE, LAMSON & JORDAN

PAUL S. JORDAN

Attorneys for Appellants

Receipt of Service.

[Endorsed]: Filed Jan. 29, 1942. [130]

[Title of District Court and Cause—Nos. 25937-S and 21792-S.]

ORDER DIRECTING CLERK REGARDING
TRANSMITTAL OF PORTIONS OF RECORD ON APPEAL [131]

Good cause appearing therefor,

It is hereby ordered that the clerk of this court transmit to and file with the United States Circuit Court of Appeals for the Ninth Circuit, as a part of the record on appeal in connection with the above entitled consolidated causes, the following:

1. Original reporter's transcript of the proceedings had and evidence taken at the trial of said causes;
2. All exhibits in original form admitted in evidence during the trial of said causes;
3. Original transcript of the proceedings had and evidence taken before Hon. Burton J. Wyman, as Special Master, on October 22, 1935,

on October 28, 1935 and on December 30, 1935 (being items numbered 6(d) and 6(e) in appellees' designation of additional contents of record on appeal on file herein), which transcript is now on file in the records of this court in connection with the above entitled cause numbered 25937-S.

Dated: January 29, 1942.

A. F. ST. SURE

United States District Judge

Approved as to form, as provided in Rule 22.

LONG & LEVIT

STANLEY PEDDER &

KENNETH FERGUSON

PILLSBURY, MADISON &

SUTRO

Attorneys for appellees

[Endorsed]: Filed Jan. 29, 1942. [132]

[Title of Court and Cause.]

ORDER EXTENDING APPELLANTS' TIME
WITHIN WHICH TO FILE AND DOCKET
RECORD ON APPEAL IN THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

It appearing to the satisfaction of the court that notice of appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment in the

above entitled consolidated causes was filed by appellants Behneman and Shores in this court on December 15, 1941, and that the forty day period from the date of filing of said notice of appeal within which the record on appeal as provided for in Rules 75 and 76 of Rules of Civil Procedure for the District Courts of the United States may be filed will accordingly expire on January 24, 1942,

Now, therefore, in accordance with Rule 73(g) of said Rules of Civil Procedure for the District Courts of the United States,

It is hereby ordered that the time of said appellants for filing said record on appeal with said appellate court and docketing the said causes therein be, and is, hereby extended to and including February 23, 1942.

Dated: January 23, 1942.

A. F. ST. SURE

United States District Judge

[Endorsed]: Filed Jan. 23, 1942. [133]

[Title of Court and Cause.]

ORDER EXTENDING APPELLANTS' TIME
WITHIN WHICH TO FILE AND DOCKET
RECORD ON APPEAL IN THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

It appearing to the satisfaction of the court that notice of appeal to the Circuit Court of Appeals

for the Ninth Circuit from the judgment in the above entitled consolidated causes was filed by appellants Behneman and Shores in this court on December 15, 1941, and that the forty day period from the date of filing of said notice of appeal within which the record on appeal was to have been filed and docketed in said Circuit Court would have expired on January 24, 1942, in accordance with Rule 73(g) of the Rules of Civil Procedure for the District Courts of the United States; and

It further appearing to the satisfaction of the court that on January 23, 1942 an order was made and entered herein extending the time of said appellants for the filing and docketing of said record on appeal in said Appellate Court to and including February 23, 1942, so that on said last mentioned date seventy days will have elapsed from the date of filing of said notice of appeal on December 15, 1941, as aforesaid,

Now, Therefore, in accordance with said Rule 73(g),

It Is Hereby Ordered that the time of said appellants for filing said record on appeal with said Appellate Court, and for the docketing of said causes therein, be, and is hereby, further extended to and including March 14, 1942.

Dated: February 11, 1942.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Feb 11 1942. [134]

District Court of the United States
Northern District of California

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 319 pages, numbered from 1 to 319 inclusive, contain a full, true and correct transcript of the records and proceedings in the matter of The Joshua Hendy Iron Works (whose name has been changed to Hendy Realization Co.) a corporation, Debtor, No. 25937-S in Bankruptcy, and Gladys M. Shores vs. Hendy Realization Co., a corporation, et al., No. 21792-S, Civil, as the same now remain on file of record in my office.

I Further Certify that I have carefully examined the records and files in my office pertaining to said action, numbered 25937-S, and that there are included in the accompanying record on appeal all pleadings and orders filed therein subsequent to Jan. 27, 1937, and up to the date of entry of judgment on Nov. 15, 1941, as designated, and that there is no record in my office of any proceedings taken or had in said action, No. 25937-S, during said period other than as indicated in the accompanying record on appeal.

I Further Certify that I have carefully examined the records and files of my office pertaining to the above-entitled action, No. 25937-S, and that no petition or petitions in intervention, or order or orders permitting intervention, such as requested

and described in Items Nos. 1 and 2 of Appellant's Supplemental Designation, were ever filed in said actions.

I Further Certify that the cost of preparing and certifying the foregoing record on appeal is the sum of \$47.20 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have set my hand and affixed the seal of said District Court at San Francisco, California, this 12th day of March, 1942.

(Seal)

WALTER B. MALING,

Clerk

By WM. J. CROSBY

Deputy Clerk. [135]

In the Southern Division of the United States District Court for the Northern District of California.

No. 25937 S

In Proceedings For Reorganization of a Corporation.

In the Matter of

THE JOSHUA HENDY IRON WORKS,
a corporation,

Debtor.

CERTIFICATE AND REPORT OF SPECIAL
MASTER RELATIVE TO THE CONFIR-
MATION OF PLAN OF REORGANIZA-
TION AND DIRECTING REORGANIZA-
TION OF DEBTOR CORPORATION.

To Honorable A. F. St. Sure, Judge of the United States District Court for the Northern District of California:

I, Burton J. Wyman, one of the referees in bankruptcy of this court, herein designated, as special master, hand up herewith a form of order for confirmation of the plan of reorganization and directing reorganization of the debtor in accordance with the plan proposed.

The hearings in connection therewith, for the most part, were held before the late Honorable W. A. Beasley, then acting as the special master of this court. The testimony taken at the hearings [136] before the said late special master was tran-

scribed and has been read by me, and I am satisfied that, as a whole, such testimony is sufficient to enable me as the now acting special master to make my recommendation to the court.

The proposed order handed up herewith, in my judgment, fairly presents, through the recitals therein, the substance of the proceedings heretofore had herein, and with it my recommendation that such proposed order be signed as the order of this court.

In reading over the transcript of the evidence taken before the now deceased special master, I did find two matters which I deemed worthy of further consideration.

The first matter was an intimation by counsel representing an objecting stockholder, that one of the stockholders consenting to the proposed plan of reorganization did so under coercion.

(See transcript of evidence taken on October 22nd, 1935, at page 33, handed up herewith as a part of this certificate and report.)

The second matter was of the contention on the part of the same counsel that the portion of the proposed plan which contemplates the surrender by the stockholders of fifty per cent (50%) of their stock to be held by the Board of Directors provided for by the proposed plan, "free and clear of any claim, right, title, or interest therein by such stockholders to be distributed by said Board, in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for manage-

ment and for successful rehabilitation of the corporation's affairs."

Under the circumstances, after notice to the interested counsel for the respective interested persons, there appeared before me on the 30th day of December, 1935, Kenneth R. Ferguson, Esq., and Stanley Peddar, Esq., the attorneys for W. R. Bas-sick, the trustee herein; L. D. Byrne, Esq., attorney for Harold M. F. Behneman, the objecting stockholder; and Marshall P. Madison, Esq., and Gerald Levin, Esq., the attorneys for the Bank of California. [137]

At the hearing held on that day the only testimony which was taken was that of Charles C. Gardner, a stockholder in his individual right, and also as the executor of the estate of Mary G. McGurn, deceased. On direct examination by Mr. Ferguson, after he had read certain excerpts from pages 32 and 35 of the transcript of the proceedings held on October 22nd, 1935, the witness Gardner stated that his acceptance of the proposed plan of reorganization was not dictated by the Bank of California.

(See page 61 of the transcript of the proceedings of December 30, 1935.)

In reply to questions on cross examination, the witness said that he did not recall saying that he was afraid of the Bank of California, but that he had said that he thought the plan to take away fifty per cent (50%) of the stock of the stock-

holders was "pretty steep." He also answered on cross examination that he would have signed the consent to the proposed plan even though the McGurn stock had not been pledged to the Bank of California, adding, "I figure that as the stock stands today, it is not worth very much and by this new reorganization scheme, there is a chance it may be worth something and I would rather have half worth something than all worth nothing."

(See transcript of proceedings, December 30, 1935, pages 62, 63, and 64.)

Proposed Plan As Shown By Paragraph 6 G
Thereof.

It will be noted that subdivision "G" of paragraph 6 of the proposed plan of reorganization of the herein debtor corporation provides as follows:

"G. Capital Stock.

"4425 shares of the capital stock of the debtor corporation are now outstanding, said shares having a book value of \$212,898.51, but no actual value.

"In consideration of the extensions granted by the creditors and of the reduction of their claims in the sum of \$73,853.06, as aforesaid, the stockholders shall [138] appropriately endorse and deliver the stock held by them to the Board of Directors of the debtor corporation, appointed as hereinafter provided, to be held by said Board as follows:

- “1. 50% of the shares so deposited by each stockholder shall be held in trust and voted by said Board for a period of 5 years, and thereafter until the extended obligations are fully paid, so as to leave the management of the debtor corporation during such period in the hands of its creditors. The Board shall have full power to vote said stock, including the power to vote for a reorganization of the capital structure of the debtor corporation so as to provide, at any time, for an issue of one or more classes of preferred stock and the exchange therefor of any part or all of the unsecured liabilities of the debtor corporation. Upon the expiration of 5 years and the payment in full of the extended obligations, such shares shall be returned to their respective owners.
- “2. The remaining 50% of the shares so delivered by each stockholder shall be held by said Board free and clear of any claim, right, title, or interest therein by such stockholder, to be distributed by said Board, in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company's affairs.

(See copy of proposed plan of reorganization of said debtor corporation, handed up

herewith as a part of this certificate and report.) [139]

Admissions As to Insolvency of Debtor

It also will be noted that there appears in the record, page 39 of the transcript of proceedings of October 22, 1935, the following admissions:

“The Master: It is conceded here that this corporation is insolvent?”

“Mr. Pedder: Absolutely insolvent.

“The Master: Everybody present concedes the insolvency?”

“Mr. Pedder: Absolutely ‘busted’.

“Mr. Byrne: I think it is ‘busted.’ ”

Objections of Harold M. F. Behneman

The objections of Harold M. F. Behneman, are as follows:

“Comes now Harold M. F. Behneman, the largest stockholder of the debtor corporation, and objects to G-2 of the re-organization plan heretofore submitted upon the grounds that the said plan contemplates the taking of stockholders’ property and giving it to others; that there is no authority for such disposition of stockholders’ property under 77-B of the National Bankruptcy Act; that if the provisions of said Bankruptcy Act do so provide, such action is contrary to the due process clause of the Constitution of the United States; and that

said plan of so disposing of stockholders' interests is inequitable and without consideration.

"Dated: October 21, 1935.

"BYRNE, LAMSON & JORDAN

"Attorneys for Stockholder
Specified"

(See original thereof handed up herewith as a part of this certificate and report.)

Contentions of Harold M. F. Behneman

The contentions of the objecting stockholder, Harold M. F. Behneman, as shown by the brief filed in his behalf, are as follows: [140]

(1) The court has no power or authority to approve subdivision G (2) of the proposed plan of reorganization, and

(2) G (2) of the plan should not be approved because it is not fair and equitable.

(See Brief of Harold M. F. Behneman On Objections to Plan Of Reorganization, handed up herewith as a part of this certificate and report.)

Discussion By and Opinion of Special Master

It is my opinion that the uncontradicted evidence herein clearly shows that the acceptance of the proposed plan of reorganization of the above named debtor corporation as given by the stockholder Charles C. Gardner, acting for himself individually, and, by express order of the Probate Court, as executor of the estate of Mary F. McGurn, de-

ceased, was not procured through fear of the Bank of California, or otherwise than voluntarily. While it is true that the record shows (Transcript of December 30, 1933, page 63.) that this stockholder did testify relative to the absolute surrender of certain stock, that he, "thought it was pretty steep," it needs no argument in my judgment, to show that this criticism is directed not to the validity of the method sought to be pursued herein, but rather to the degree to which the court shall say such absolute surrender shall be exercised under the plan to be adopted. In other words, the criticism goes to the fairness of the plan, and hence at the proper time only can be considered in this regard.

Passing now to the contentions made on behalf of the objecting stockholder, Harold M. F. Behneman, we find first that it is claimed that the court has no power or authority to approve subdivision G (2) of the proposed plan of reorganization, and secondly, that G (2) of the proposed plan should not be approved because it is not fair and equitable.

Discussing these contentions in the order stated, it appears to me that the first contention depends entirely on two major propositions; one of fact, i. e., the financial condition of the debtor, so far as solvency or insolvency is concerned; the other of law, viz., the legal effect of the words "modifying or altering the rights of stockholders, or any class of them, either through the issuance of new securities of [141] any character or otherwise." Bankruptcy Act, sec. 77B (b) (2).

The question of fact, it properly may be said, is self-determined. In other words, since it has been conceded by all that the corporation is insolvent, that element of the case is settled. Under the circumstances, it appears, that the court is thus bound to proceed upon the theory that at this stage of the proceedings the stock is utterly worthless. Even so, however, has the court power or authority to approve the proposed plan of reorganization insofar as the absolute surrender of the stock is concerned? In my judgment, section 77B unquestionably gives the court that power and authority. I rest my judgment in this regard, in part, upon such cases as *United States v. Felder*, 13 F. (2d) 527, 528, *State v. Lawrence*, 7 Pac. 116, 117, and *Black River Imp. Co. v. Holway*, 59 N. W. 126, 128, wherein the words "modify" and "alter" are defined. In *United States v. Felder*, supra, page 528, the court said, "The word 'modify' is . . . defined as follows: 'To limit or reduce in extent or degree; to change the form or qualities of.' " In *State v. Lawrence*, supra, pages 116 and 117, the court of the same word, has this to say, "In a general sense, to modify means to change or vary, to qualify or reduce; and unless there is something in the context, or special usage, the words are to be taken in their plain, ordinary, and proper sense. A power given to modify . . . implies the existence of the subject matter to be modified. . . . When exercised to modify, it does not destroy identity, but effects some change or qualification in *for* or *quali-*

ties, powers or duties, purposes or objects, of the subject-matter to be modified. . . .”

See, also, *State v. Tucker*, 61 Pac. 894, 897.

The court in *Black River Imp. Co. v. Holway*, supra, page 128, defines the word “alter” in this way: “To alter is to make different, without destroying identity; to vary, without entire change.” Hence when it is recalled “. . . that the stockholder’s interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors,” *Kansas City Terminal R. Co. v. Central Union Trust Co.*, 271 U. S. 445, 454, it is easy to perceive, in the light of these definitions, how untenable is the objecting stockholder’s position with regard to the [142] absolute surrender of stock as provided for by the proposed plan of reorganization, unless there be something in his contention that the word “otherwise” must be read with the doctrine of *ejusdem generis* in mind. In this connection the case of *People v. McKean*, 76 Cal. App. 114, page 3 of the Brief of Harold M. F. Behneman, has been called to the court’s attention, as also, on the same page of said brief was 19 C. J., page 1255, where, speaking of “*ejusdem generis*” it is explained as being, “a well known maxim of construction to aid in ascertaining the meaning of a statute or other written instrument, the doctrine being that where an enumeration of specific things is followed by some more general word or phrase is to be held to refer to things of the same kind.”

Remembering the highly remedial character of the statute here under discussion, it is my opinion that to hold that this court is bound to invoke this rule of construction, would be to place such a narrow interpretation upon the words in question as to hamper the court in endeavoring to give effect to a statute which Congress manifestly intended to be sweeping in its scope and drastic in its results to the end that a corporation in danger of failing might be given a new lease on its stockholders. Although used in the dissenting opinion of *People v. McKean*, *supra*, pages 123 and 124, the words of Craig, J., in my judgment, are exceedingly appropriate herein and worthy of consideration. He said, “. . . courts have no right to permit a blind devotion to the maxim *ejusdem generis* to interfere with the full accomplishment of the manifest purpose of the legislature.” To this language may also appropriately be added that found in *State v. Broderick*, 7 Mo. App. 19, 21, wherein it was said, “. . . it is plain that this rule has no bearing whatever here. It is by no means a rule of universal application, and its use is to carry out, not to defeat the legislative intent. When it can be seen that the particular word by which the general word is followed was inserted, not to give coloring to the general word, but for a distinct object, and when, to carry out the purpose of the statute, the general word ought to govern, it is a mistake to allow the *ejusdem generis* rule to pervert the construction.”

Nor am I impressed with the reference to "due process" in connection with the absolute surrender of the stock. In my opinion the test in this regard is found in *Campbell v. Alleghany Corporation*, (C.C.A. 4) 75 F. (2d) 947, 953, wherein it is said ". . . as any exercise of the bankruptcy power impairs the obligation of contracts, such impairment is not in itself a denial of due process. For the provisions of the act to violate the amendment, they must be so grossly arbitrary and unreasonable as to be 'incompatible with fundamental law' ". Can it be said that any interpretation which this court is asked to put on this particular provision of 77B of the Bankruptcy Act gives rise to a situation which is 'incompatible with fundamental law'? Moreover, can there be any possible question as to whether or not the proposed plan is fair and equitable when it is kept in mind that, "A right may be altered without inflicting damage. Often a benefit may accrue"? Application of *Silberkraus*, 165 N. E. 279, 280, 250 N. Y. 242, 246. The herein proposed plan in effect says to the stockholders, "Your stock at the present time is worthless; this you concede when you admit the corporation is insolvent. Turn in all your stock. If at the end of five years the payment in full of the extended obligations has been accomplished, fifty per cent (50%) of that stock will be returned to you, the other fifty per cent (50%) is to be held free and clear of any claim, right, title or interest of yours. This latter portion of your stock, in its sole discretion, the

Board of Directors, will distribute, either in whole or in part, to the managing officers thereof as a reward for management and the successful rehabilitation of the company's affairs." Bluntly put the proposition to the stockholders is this: You have nothing now except some worthless stock. Surrender it. Perhaps at the end of five years, if things go as planned, you will get back one-half thereof and it may be of some value. It also may be that the other half of your stock, at that time may be of like value, but in the meantime has been placed in hands other than yours for a consideration, however.

Such being the case, there is nothing strange or inequitable about such a set-up; it is not a case of taking from Peter to pay Paul. All it amounts to is a practical way of putting into effect the ancient maxim ". . . the labourer is worthy of his hire."

[144]

Recommendation of Special Master

The special master therefore respectfully recommends that the accompanying order, wherein the approval of the proposed plan of reorganization is sought to be decreed, should be made. The special master further recommends that the court make such other and further order, or orders, as may be necessary to provide for the payment of the hereinafter referred to compensation and expenses of the late Honorable W. A. Beasley, as well as the payment of the compensation and expenses of the undersigned special master.

Compensation and Expenses of Special Master

As near as I can determine from the record before me, the unpaid compensation of the late Honorable W. A. Beasley, as special master, amounts in the aggregate to the sum of \$75.00, i.e., three days' hearings at the rate of \$25.00 per day, and his expenses, exclusive of the stenographic reporter's fees, the sum of \$15.00. In addition thereto is the expenses of the stenographic reporter made up of the following items:

1934

Oct. 16	To per diem (no charge)	
22	“ “	6.25
28	“ “	6.25
Dec. 6	Transcript	49.50
30	To per diem.....	6.25
30	To transcript	9.00
		<hr/>
		\$77.25

It will be noted that part of the expenses of the stenographic reporter accrued during the time that the late special master had charge of these proceedings, the balance thereof having accrued since the undersigned special master took over the work.

In my opinion, the charges and expenses as aforesaid are reasonable.

With reference to my compensation as special master, I am of the opinion that an allowance of \$25.00 for the one hearing, and to cover the preparation of this certificate and report is reasonable, and I therefore respectfully request such an allow-

ance. As regards my expenses as special master, I believe the sum of \$10.00 to cover office expenses [145] and clerical services is a reasonable amount to be allowed therefor, and I respectfully request the allowance of said amount for said expenses.

Papers Handed Up Herewith

I hand up herewith the following papers:

(1) Objection of Harold M. F. Behneman, to plan of reorganization;

(2) Brief of Harold M. F. Behneman On Objections to Plan of Reorganization;

(3) Memorandum of Points and Authorities of W. R. Bassick, Trustee, as Amicus Curiae, on Further Hearing Upon Proposed Plan of Reorganization;

(4) Brief of Petitioning Creditors in support of the Proposed Plan of Reorganization and in Reply to the Brief of Harold M. F. Behneman;

(5) Reply of Harold M. F. Behneman to Brief of Petitioning Creditors on Plan of Reorganization; attached to which is a letter dated January 13, 1936 addressed to the special master by Messrs. Byrne, Lamson & Jordan;

(6) Affidavit of mailing notice to stockholders, etc.;

(7) Envelope containing acceptances of plan of reorganization, including certified copy of order approving acceptance of plan of reorganization made by the Superior Court of the State of California, in the matter of the estate of Mary F. McGurn, deceased, No. 26673. Memorandum of verified

acceptances of proposed plan of reorganization, Memorandum regarding class "B" notes, class "C" notes, class "D" notes, and class "E" notes, Memorandum of Joshua Hendy Iron Works, Sunnyvale Plant;

(8) Protest of H. L. E. Meyer, Jr.;

(9) Printed copy of proposed plan of reorganization, etc.;

(10) Transcript of proceedings held before the special master on October 22nd, 1935, etc.;

(11) Transcript of proceedings held before the special master [146] on December 30th, 1935;

(12) Letter from Stanley Pedder, Esq., to special master dated December 17, 1935; and

(13) Proposed order confirming plan or reorganization and directing reorganization of debtor corporation.

Dated: February 19, 1936.

Respectfully submitted,

BURTON J. WYMAN

Special Master

[Endorsed]: Filed Feb 19 1936. [147]

[Title of Court and Cause.]

Before W. A. Beasly, Special Master

Comes now Harold M. F. Behneman, the largest stockholder of the debtor corporation, and objects to G-2 of the reorganization plan heretofore submitted upon the grounds that the said plan contem-

plates the taking of stockholders' property and giving it to others; that there is no authority for such disposition of stockholders' property under 77-B of the National Bankruptcy Act; that if the provisions of said Bankruptcy Act do so provide, such action is contrary to the due process clause of the Constitution of the United States; and that said plan of so disposing of stockholders' interests is inequitable and without consideration.

Dated: October 21, 1935.

BYRNE, LAMSON AND JORDAN
Attorneys for Stockholder Specified

[Endorsed]: Filed with Spl Mstr Oct 22 1935

[Endorsed]: Filed Feb 19 1936. [148]

[Title of District Court and Cause—No. 25937-S.]

AFFIDAVIT OF MAILING

State of California,

City and County of San Francisco—ss.

S. Ramon, being first duly sworn, deposes and says:

That my name is S. Ramon. I am now and was at all times herein mentioned a citizen of the United States, over the age of twenty-one years, and not a party to nor interested in the above entitled action. [149]

I did on October 4, 1935, on behalf of W. R. Bassick, trustee for The Joshua Hendy Iron Works, debtor corporation, and more than ten days prior to October 16, 1935, the date set for hearing as provided in the hereinafter contained notices, deposit in the United States Post Office at San Francisco, California, true and correct copies of the notices hereinafter set forth and the proposed plan of reorganization of The Joshua Hendy Iron Works, debtor corporation, hereinafter set forth, each of said copies of said notices and said proposed plan of reorganization so deposited being enclosed in a separate, sealed envelope, postage thereon prepaid, and in the event of envelopes addressed outside of the State of California, with air mail postage thereon prepaid, and that said envelopes, each containing one of each of said copies of said notices and one copy of said proposed plan of reorganization, were respectively addressed to each of the stockholders of, and each of the creditors of, and to each of the persons having claims against or interests in, The Joshua Hendy Iron Works, debtor corporation, as the same appeared as such stockholders and creditors and persons having a claim or interest upon the books and records of said corporation as of October 1, 1935, directed to such stockholders and creditors and persons having a claim or interest at their respective addresses as the same appeared upon such books and records as of said last mentioned date.

That one of said notices, hereinabove referred to, and so mailed by me to each of the stockholders and creditors and persons having a claim or interest in The Joshua Hendy Iron Works, debtor corporation, was in words and figures as follows, to-wit: [150]

[Title of District Court and Cause—No. 25937-S.]

NOTICE.

Notice is hereby given that a proposed plan of reorganization of The Joshua Hendy Iron Works, debtor corporation, has been filed herein by the creditors of the debtor corporation who filed the original petition herein for the reorganization of said debtor corporation, such creditors having aggregate claims comprising more than 10% in amount of all claims against the debtor corporation and more than 20% of several classes of claims against the debtor corporation, whose interests will be affected by said plan, and by stockholders holding more than 10% of all of the outstanding stock of said debtor corporation whose interests will be affected by said plan; and that pursuant to the order of the above entitled court duly given and made on September 30, 1935, and the provisions of Section 77B of the Bankruptcy Act, Wednesday, October 16, 1935, at the hour of ten o'clock A. M., at the courtroom of the Honorable W. A. Beasley, the Special Master herein, room 609, 1095 Market Street, San Francisco, California, has been appointed as the date, time, and place for the

hearing of the same, and all persons interested are hereby notified to appear at said time and place, then and there to show cause, if any they have, why said proposed plan of reorganization should not be accepted and confirmed. A copy of said proposed plan of reorganization is hereto annexed and incorporated herein by reference, and notice is hereby given that any and all stockholders interested therein may file their written acceptance of said proposed plan of reorganization, pursuant to said Section 77B, with the undersigned, as trustee, for delivery by the undersigned, at the time of hearing, to the above entitled court.

Dated, September 30, 1935.

W. R. BASSICK,

Trustee for the Joshua Hendy
Iron Works, Debtor Corpor-
ation.

STANLEY PEDDER,

KENNETH FERGUSON,

Attorneys for Trustee.

That the other notice, hereinabove referred to, and so mailed by me to each of the stockholders and creditors and persons having a claim or interest in The Joshua Hendy Iron Works, debtor corporation, was in words and figures as follows, to-wit:

[Title of District Court and Cause—No. 25937-S.]

NOTICE.

Notice is hereby given that whereas, prior to the institution of the above entitled proceeding, an equity receivership of The Joshua Hendy Iron Works was pending in the Superior Court of the State of California, in and for the City and County of San Francisco; and

Whereas, by the order of said court duly given and made on August 1, 1935, the fee of Stanley Pedder, the duly appointed attorney for the receiver therein, covering his services from the date of the appointment of said receiver up to the date of the suspension of said receivership by the above entitled proceeding was fixed at \$3000.00, whereof a balance of \$2500.00 remains unpaid;

The undersigned, as trustee for The Joshua Hendy Iron Works, debtor corporation, has filed herein his verified petition for authority to pay the unpaid balance of said fee allowed to said receiver's attorney by the court appointing said receiver, and that Wednesday, the 16th day of October, 1935 at the hour of ten o'clock A. M., at the courtroom of the Honorable W. A. Beasly, the Special Master herein, room 609, 1095 Market Street, San Francisco, California, has been appointed as the date, time, and place for the hearing of the same, and all persons interested are hereby notified to appear at said time and place, then and there to show cause, if any they have, why said petition should not be

granted and said payment made. For further particulars reference is hereby made to said petition now on file herein.

Dated, September 30, 1935.

W. R. BASSICK,

Trustee for The Joshua Hendy
Iron Works, Debtor Corporation.

STANLEY PEDDER,

KENNETH FERGUSON,

Attorneys for Trustee. [151]

[Title of District Court and Cause.]

PROPOSED PLAN OF REORGANIZATION
OF THE JOSHUA HENDY IRON WORKS,
DEBTOR CORPORATION.

1. General.

The debtor corporation was incorporated in the State of California, on September 11, 1906. A receiver of its assets and affairs was appointed by the Superior Court of the State of California on May 17, 1932, and such receivership continued until March 21, 1935, the date of the appointment of the trustee in the above entitled proceeding.

The statement of assets and liabilities of the debtor corporation, and the computations therefrom, contained in this plan of reorganization, are made as of July 31, 1935. Interest is, of course, accruing upon the obligations of the debtor cor-

poration, and its current accounts are, by virtue of the continuance of its business, subject to constant fluctuation, so that the figures as of July 31, 1935, necessarily cannot be regarded as final, but only approximately so.

Since this plan of reorganization contemplates, however, that all claims arising subsequent to May 17, 1932, the date that the corporation was first placed in receivership, will be paid in the usual course of business, the fluctuation in current accounts is not vital; and the only classes of creditors directly concerned with this organization are those whose claims accrued prior to May 17, 1932.

2. Present securities and obligations.

The outstanding securities and obligations of the debtor corporation on July 31, 1935, were as follows:

- a. First Mortgage Sinking Fund
6% 25 year Gold Bonds, matured May 1, 1933, a first lien upon the Sunnyvale property of the debtor corporation

[153]

1. Issued for cash:

H. L. E. Meyer.....\$ 10,000.00

2. Issued as collateral:

Bank of California, N. A.... 147,500.00

Julia Routzahn 8,500.00 \$166,000.00

- b. Capital stock, 4425 shares, par value \$100. per share.....

\$442,500.00

3. Other Liabilities.

In addition, the liabilities of the debtor corporation, shown upon its books as of July 31, 1935, are as follows:

- a. Liabilities accrued prior to May 17, 1932, the date of the appointment of the receiver:
 1. First Mortgage Bonds of the debtor corporation held by H. L. E. Meyer, as aforesaid, in the principal amount of\$ 10,000.00
 Plus accrued interest to July 31, 1935..... 1,050.00
 2. Notes payable to The Bank of California, N. A., secured by \$147,500 principal amount First Mortgage Bonds of debtor corporation as aforesaid, and assignment of certain accounts receivable, items of inventory, and otherwise..... 415,980.00
 Plus accrued interest to July 31, 1935..... 86,269.09
 3. Note payable to Julia Routzahn, secured by \$8,500 principal amount First Mortgage Bonds of debtor corporation, as aforesaid 6,000.00
 Plus accrued interest to July 31, 1935..... 1,105.90
 4. Unsecured notes and trade acceptances payable 31,641.50
 Plus accrued interest to July 31, 1935..... 6,568.99

5. Unsecured accounts payable—trade	27,983.54
6. Unsecured accounts payable—officers and employees	26,373.62
7. Unsecured claim in suspense	10,197.50
	<hr/>
	\$623,170.14

[154]

b. Liabilities accrued since May 17, 1932:

1. Notes payable to The Bank of California, N. A., secured by assignment of certain accounts receivable, pursuant to court direction	\$ 45,000.00
2. Accrued Salaries	1,523.95
3. Accounts Payable	41,056.64
4. Sales Tax Payable.....	277.11
5. Accrued taxes on real estate	420.85
6. Claim of Carlo Lastreto (judgment creditor A. L. Behneman) in litigation.....	3,489.37
7. Accrued Federal Income Tax—deficiency for years prior to receivership which cannot now be contested and in regard to which preference is claimed.....	2,450.59
8. Reserve for accrued interest on same.....	2,168.77
	<hr/>
	\$ 96,387.28

\$719,557.42

4. Assets.

There is no physical inventory of the assets of the debtor corporation as of July 31, 1935. The items under the heading "Inventories" therefore reflect only their book cost; and the items under "Capital Assets" are stated at their book values, which are subject to a substantial write-down because of excess capital charges made, and insufficient depreciation and amortization taken, in prior years.

The assets of the debtor corporation shown upon its books as of July 31, 1935, are as follows:

Current Assets:

Cash on Hand and in Banks.....\$ 5,825.58

Accounts Receivable.....\$61,764.05

Less Reserve for Bad

Accounts	3,066.28	58,697.77
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Inventories:

Raw materials, work in Process,

Used Machinery, etc. Finished

Goods	93,058.46
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Goods out on consignment.....	566.48
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Work in Process, Job #4035.....	594.48
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Revolving Fund Deposit Boulder

Dam Job	40,000.00
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Total Current Assets.....	\$198,742.77
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[155]

Capital Assets:

Land: Bay and Kearny Sts., San Francisco	\$ 78,488.61	
Sunnyvale Plant, etc.....	17,111.21	
Buildings	102,962.57	
Machinery, Tools, and Fixtures.....	443,480.56	
Stock Patterns	53,366.15	
Stock Drawings and Artists' Sketches	25,495.59	
Office Furniture and Fixtures.....	2,344.74	
Automobiles	1,160.50	
Patents	155.00	724,564.93

Other Assets:

Notes Receivable Past

Due\$13,875.91

Doubtful Accounts

Receivable 16,850.65

\$30,726.56

Less: Reserve 30,726.56

Sundry Deposits 334.93

East Nashville and Granite Mines..... 2,414.92

Too Handy Mine Inventory..... 1,734.78

Orchard Operations 223.82

Unexpired Insurance 3,726.51

Advances to Salesmen..... 713.27 9,148.23

Total \$932,455.93

5. Retention of existing corporation.

The reorganization of the debtor corporation is to be effected without resort to the agency of a new corporation, in order to avoid the expense attendant upon the formation of a new corporation, and so as to preserve certain invention shop rights

which are personal to the present debtor corporation.

6. Securities and obligations to be issued.

This plan of reorganization requires the division and treatment of the foregoing securities, obligations, and liabilities of the debtor corporation into seven classes:

A. Accrued Income Taxes.

The debtor corporation is indebted to the United States in the sum of \$2450.59, plus accrued interest, on account of assessed deficiency in its income tax for the years 1927-1928. This amount shall be paid in six monthly cash installments, commencing one month after the date of the order confirming this plan of reorganization.

B. Bonds and notes secured by bonds.

The present bond issue shall be cancelled, and in exchange therefor the debtor corporation shall issue secured 5 year notes on the following basis, which reduces their claims by 10%: [156]

	Amount due	Amount of new note
1. H. L. E. Meyer; \$10,000.00 par bonds, plus \$1050.00 accrued interest	\$ 11,050.00	\$ 9,945.00
2. Julia Routzahn; \$6000.00 note now secured by \$8500.00 par bonds, plus \$1105.90 accrued interest	7,105.90	6,395.31
3. The Bank of California, N. A., notes now generally secured by \$147,500.00 par bonds, plus \$139,387.50 accrued coupons and interest	286,887.50	258,198.75
Total.....	\$305,043.40	\$274,539.06

Such notes shall bear interest at the rate of 3% per annum for the first three years, 4% per annum for the fourth and fifth years, and 5% per annum thereafter, with the privilege to the debtor corporation to pay such interest, during the first five years, in 5% interest bearing scrip secured by the same security.

Such notes shall be secured by a first deed of trust covering all of the property now covered by the present bond issue, and no default shall be chargeable against the debtor corporation thereunder during the first five years except in the event that it shall fail to pay the taxes upon the property covered thereby, or shall become insolvent.

C. Notes secured by real property.

The Bank of California, N. A., holds, as general security, a first deed of trust upon the San Francisco property of the debtor corporation at Bay and Kearny Streets, the value of which property is alleged to be approximately \$80,000.00. The debtor corporation shall issue to The Bank of California, N. A., in lieu thereof, a secured 5 year note in the amount of \$80,000.00 specifically secured by a first deed of trust upon the Bay-Kearny Street property, which note shall bear interest at the rate of 3% per annum for the first three years, 4% per annum for the fourth and fifth years, and 5% per annum thereafter, such interest to be payable only out of the proceeds of the sale of the property, and no default shall be chargeable against the

debtor corporation thereunder during the first 5 years except in the event that it shall fail to pay the taxes upon the property covered thereby, or shall become insolvent.

The deed of trust shall provide that the holder thereof may, at any time, require the sale of the property by the trustee under said deed of trust, for a cash sale price of not less than \$80,000.00. In the event of such sale the proceeds thereof shall be applied first upon the amount then due under such note, and any excess over the amount due on said note shall be paid to the debtor corporation. Should such sale result in a deficit, such deficiency of principal and interest shall not become due until the original 5 year due date of said note. [157]

If, upon the 5 year due date of said note, the property shall not yet have been sold, and the taxes thereon have been paid, the debtor corporation may renew said note for a further period of 5 years, such renewal note to bear interest at 5% per annum.

The claim of this creditor, represented by the foregoing new note shall, in addition, be reduced by 10%, or \$8000.00, by deducting said sum from the unsecured claims due it. (See Class "E".)

D. Notes otherwise secured.

The Bank of California, N. A., holds notes of the debtor corporation, generally secured by items of inventory of an aggregate value of approximately \$7,405.00. The debtor corporation shall issue to The Bank of California, N. A., in lieu

thereof, secured notes in the amount of \$7,405.00, maturing in 5 years, with the same security, unless the security therefor is earlier realized upon.

Such notes shall bear interest at the rate of 5% per annum, payable, prior to maturity or date of payment of principal only out of the realization of their respective securities, otherwise to accumulate.

If realization upon the security for any note shall result in an excess over the amount of principal and interest then due on said note, such excess shall be paid to the debtor corporation, and not treated as security for other notes held by the same holder. Each note shall be secured only by the specific security therefor, and such security shall not be security for the payment of any of the other notes.

The claim of this creditor, represented by the foregoing new note shall, in addition, be reduced by 10%, or \$740.50, by deducting said sum from the unsecured claims due it. (See Class "E".)

E. Unsecured notes and accounts prior to May 17, 1932.

The debtor corporation shall issue to such creditors unsecured 5 year notes for 85% of their claims, the unsecured creditors thus reducing their claims by 15%, as follows:

	Claim	Amount of new notes
1. The Bank of California, N. A., balance of notes held by it after specific allocation of security: (amount of new note being reduced, in addition to 15%, by 10% on Classes "C" and "D", as aforesaid).....	\$127,956.59	\$100,022.60
2. Trade creditors (128).....	27,983.54	23,786.01
3. Holders of notes and accept- ances (12)	38,210.49	32,478.92
4. Officers and employees, salary accounts	26,373.62	22,417.58
5. Claim in suspense.....	10,197.50	8,667.87
Total.....	\$230,721.74	\$187,372.98

[158]

Such notes shall bear no interest at all for the first three years, and interest thereafter at the rate of 5% per annum, payable only if earned, and payable then only upon maturity; with the privilege to the debtor corporation, at maturity, to renew said notes for their face value plus accumulated interest, such renewal notes to bear interest at 5% per annum and be payable in five annual installments of 20% each.

F. Notes and accounts subsequent to May 17, 1932.

Liabilities incurred by the trustee since his appointment on March 21, 1935, and liabilities incurred during the prior receivership, from May 17, 1932, to March 20, 1935, with the exception of in-

terest on notes and accounts accrued prior thereto, and whether secured or unsecured, shall be continued as current liabilities of the debtor corporation, payable in cash in the usual course of business. These liabilities are set forth in paragraph 3b, *supra*, and total, as of July 31, 1935, \$96,387.28.

G. Capital stock.

4425 shares of the capital stock of the debtor corporation are now outstanding, said shares having a book value of \$212,898.51, but no actual value.

In consideration of the extensions granted by the creditors and of the reduction of their claims in the sum of \$73,853.06, as aforesaid, the stockholders shall appropriately endorse and deliver the stock held by them to the Board of Directors of the debtor corporation, appointed as hereinafter provided, to be held by said Board as follows:

1. 50% of the shares so deposited by each stockholder shall be held in trust and voted by said Board for a period of 5 years, and thereafter until the extended obligations are fully paid, so as to leave the management of the debtor corporation during such period in the hands of its creditors. The Board shall have full power to vote said stock, including the power to vote for a reorganization of the capital structure of the debtor corporation so as to provide, at any time, for an issue of one or more classes of preferred stock and the exchange therefor of any part or all of the un-

secured liabilities of the debtor corporation. Upon the expiration of 5 years and the payment in full of the extended obligations, such shares shall be returned to their respective owners.

2. The remaining 50% of the shares so delivered by each stockholder shall be held by said Board free and clear of any claim, right, title, or interest therein by such stockholder, to be distributed by said Board, in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company's affairs. [159]

7. Management of debtor corporation.

The management of the debtor corporation will be vested for a period of 5 years, and thereafter until the extended obligations hereunder are fully paid, in a board of 5 directors, who shall be the Board of Directors of the debtor corporation, and act as representatives of its various classes of securities and obligations. The first Board of Directors shall be comprised of:

Three directors nominated by and representing the secured noteholders of Classes "B", "C", and "D" aforesaid, or either or any of such classes;

One director nominated by and representing the unsecured note holders of Class "E" afore-

said, but chosen from representatives of such Class "E" creditors other than those who are also in either of Classes "B", "C", or "D"; and

One director nominated by and representing stockholders of the debtor corporation.

Vacancies in the personnel of said first Board of Directors shall be filled by majority vote, by amount, of the class represented by the vacating directors.

8. Effect.

While this plan of reorganization will not expunge any of the liabilities of the debtor corporation by transferring them into capital, it will definitely postpone the payment of both principal and interest on pre-receivership obligations (excepting from proceeds of assets already allocated as security and therefore not available for working capital) for a sufficiently long period to give the new management an opportunity to resuscitate the debtor corporation, while at the same time the rate of interest is materially reduced. The mere deferment of payment does not, of course, satisfy either principal or interest; but it is manifest that the definite postponement of the payment of all interest and pre-receivership liabilities for five years (so that, during such period, the debtor corporation will only be required to pay its current operating expenses, taxes, and the small balance of its receivership

accounts, will afford the new management a reasonable opportunity for rehabilitation. If the affairs of the debtor corporation cannot be restored within this period, drastic measures, perhaps even abandonment, will be necessary. If, however, substantial progress is made, any necessary further funding should be readily accomplished.

For illustration and comparison, balance sheets have been prepared and annexed hereto, showing:

Exhibit (a) The assets and liabilities of the debtor corporation shown upon its books as of July 31, 1935; and

Exhibit (b) The proposed assets and liabilities of the debtor corporation after the adoption of this plan of reorganization (upon the basis of Exhibit A). [160]

9. Approval of plan.

This plan of reorganization is approved and presented by the creditors of the debtor corporation who filed the original petition herein for the reorganization of the debtor corporation pursuant to Section 77B of the Bankruptcy Act, and by stockholders holding more than 10% of all of the outstanding stock of the debtor corporation whose interest will be affected by this plan. The aggregate claims of the undersigned creditors comprise more than 10% in amount of all claims against the debtor corporation, and more than 20% of several classes of claims, against

the debtor corporation, whose interests will be affected by this plan.

Respectfully submitted,

THE BANK OF CALIFORNIA,
NATIONAL ASSOCIATION,
By C. B. MOORES, A. C.

MOORE DRY DOCK
COMPANY,
By A. R. VINER, Asst. Secy.

BAKER-HAMILTON &
PACIFIC COMPANY,
By PHILIP S. BAKER,
Secretary,
Creditors.

ALBERTIE M. HENDY,
Stockholder.

STANLEY PEDDER,
KENNETH FERGUSON,
Financial Center Building, San Francisco,
Attorneys for W. R. Bassick,
Trustee for Debtor Corporation. [161]

“EXHIBIT A”

W. R. Bassick, Trustee for the Joshua Hendy Iron Works

BALANCE SHEET—AS AT JULY 31, 1935

(Per Books)

ASSETS

Current Assets:

Cash on Hand and in Banks.....	\$ 5,825.58
Accounts Receivable	\$61,764.05
Less Reserve for Bad Accounts.....	3,066.28
	<hr/>
	58,697.77

Inventories: (Note A)

Raw Materials, Work in Process, Used Machinery, etc., Finished Goods	93,058.46
Goods out on Consignment.....	566.48
Work in Process, Job #4035.....	594.48
Revolving Fund Deposit Boulder Dam Job.....	40,000.00

Total Current Assets.....
\$198,742.77

Capital Assets: (Note B)

Land: Bay and Kearny Sts., San Francisco.....	\$ 78,488.61
Sunnyvale Plant, etc.....	17,111.21
Buildings	102,962.57
Machinery, Tools, and Fixtures.....	443,480.56
Stock Patterns.....	53,366.15
Stock Drawings and Artists' Sketches.....	25,495.59
Office Furniture and Fixtures.....	2,344.74
Automobiles	1,160.50
Patents	155.00
	<hr/>
	724,564.93

Other Assets:	
Notes Receivable Past Due.....	\$13,875.91
Doubtful Accounts Receivable.....	16,850.65
	<hr/>
Less: Reserve	\$30,726.56
	30,726.56
	<hr/>
Sundry Deposits	334.93
East Nashville and Granite Mines.....	2,414.92
Too Handy Mine Inventory.....	1,734.78
Orchard Operations	223.82
Unexpired Insurance	3,726.51
Advances to Salesmen.....	713.27
	<hr/>
	9,148.23
	<hr/>
Total	\$932,455.93
	<hr/>
	<hr/>
	[162]

“EXHIBIT A”

W. R. Bassick, Trustee for the Joshua Hendy Iron Works

BALANCE SHEET—AS AT JULY 31, 1935

(Per Books)

LIABILITIES

Current Liabilities:

Accrued Salaries	\$ 1,523.95
Accounts Payable	41,056.64
Sales Tax Payable.....	277.11
Accrued Real Estate Taxes.....	420.85
Notes Payable Secured.....	45,000.00
Claim Carlo Lastreto in Litigation.....	3,489.37
Reserve for Federal Income Tax—Deficiency.....	\$ 2,450.59
Reserve for Federal Income Tax—	
Interest March 15, 1928 to July 31, 1935.....	4,619.36

Total Current Liabilities..... \$ 96,387.28

Deferred Liabilities—Prior to May 17, 1932:

First Mortgage Sinking Fund 6% Gold Bonds (Note C).....	\$ 10,000.00
Plus Accrued Int. to July 31, 1935.....	1,050.00
	11,050.00

Note Payable, Julia Routzahn.....	\$ 6,000.00
Plus Accrued Int. to July 31, 1935.....	1,105.90
	7,105.90

Notes Payable, Bank of California.....	\$415,980.00	
Plus Accrued Int. to July 31, 1935.....	86,269.09	502,249.09
<hr/>		
Notes Payable and Trade Acceptances.....	\$ 31,641.50	
Plus Accrued Int. to July 31, 1935.....	6,568.99	38,210.49
<hr/>		
Accounts Payable, Trade.....		27,983.54
Accounts Payable, Officers and Employees.....		26,373.62
Claim in Suspense.....		10,197.50
<hr/>		
Capital and Surplus:		
Common Stock Issued.....		\$532,500.00
Less: In Treasury.....		90,000.00
<hr/>		
Surplus		229,601.49*
<hr/>		
Total		\$932,455.93
<hr/>		

*Indicates red figure.

Notes: (A) Stated at book cost; physical inventories not taken as at July 31, 1935.

(B) Stated at book values, subject to write-down for excess capital charges and insufficient depreciation and amortization taken in prior years.

(C) Does not include bonds of a par value of \$156,000.00 issued for collateral and without con- sideration.

"EXHIBIT B"

W. R. Bassick, Trustee for the Joshua Hendy Iron Works

BALANCE SHEET—AS AT JULY 31, 1935

(After giving effect to proposed Reorganization)

ASSETS

Current Assets:

Cash on Hand and in Bank.....	\$ 5,825.58
Accounts Receivable	\$61,764.05
Less Reserve for Bad Accounts.....	3,066.28
	<hr/>
	58,697.77

Inventories: (Note A)

Raw Materials, Work in Process, Used Machinery, etc.,	
Finished Goods	93,058.46
Goods out on Consignment.....	566.48
Work in Process, Job #4035.....	594.48
Revolving Fund Deposit Boulder Dam Job.....	40,000.00

Total Current Assets.....

\$198,742.77

Capital Assets: (Note B) At Book Value		
Land: Bay and Kearny Sts., San Francisco	78,488.61	
Sunnyvale Plant, etc.	17,111.21	
Buildings	102,962.57	
Machinery, Tools, and Fixtures	443,480.56	
Stock Patterns	53,366.15	
Stock Drawings and Artists' Sketches	25,495.59	
Office Furniture and Fixtures	2,344.74	
Automobiles	1,160.50	
Patents	155.00	
	<u>\$724,564.93</u>	
Less: Reduction in Amount of Creditors Claims	73,853.10	650,711.83
Other Assets:		
Notes Receivable Past Due	\$13,875.91	
Doubtful Accounts Receivable	<u>16,850.65</u>	
Less: Reserve	\$30,726.56	
	<u>30,726.56</u>	
Sundry Deposits	334.93	
East Nashville and Granite Mines	2,414.92	
Too Handy Mine Inventory	1,734.78	
Orchard Operations	223.82	
Unexpired Insurance	3,726.51	
Advances to Salesmen	713.27	
Total	<u>9,148.23</u>	<u>\$858,602.83</u>
		<u>[164]</u>

That said proposed plan of reorganization of The Joshua Hendy Iron Works, debtor corporation, hereinabove referred to, and so mailed by me to each of the stockholders and creditors and persons having a claim or interest in The Joshua Hendy Iron Works, debtor corporation, was in words and figures as follows, to-wit:

“EXHIBIT B”

W. R. Bassick, Trustee for the Joshua Hendy Iron Works

BALANCE SHEET—AS AT JULY 31, 1935
(After giving effect to proposed Reorganization)

LIABILITIES

Current:		
Accounts Payable	\$ 41,056.64	
Note Payable, Bank of California—Secured	45,000.00	
Accrued Salaries and Wages	1,523.95	
Accrued Sales Tax	277.11	
Accrued Property Tax	420.85	
Federal Income Tax Deficiency and Interest, Class A	4,619.36	
Claim of Carlo Lastreto, in Litigation	3,489.37	
Total Current Liabilities		\$ 96,387.28
Deferred:		
Secured Five Years Notes Payable:		
H. L. E. Meyer	Class B	\$ 9,945.00
Julia Routzahn	“ B	6,395.31
Bank of California, N. A.	“ B	258,198.75
Bank of California, N. A.	“ C	80,000.00
Bank of California, N. A.	“ D	7,405.00
		361,944.06

Unsecured Five Year Notes Payable, Class E:

Bank of California, N. A.....	100,022.60	
Sundry Trade Accounts.....	23,786.01	
Sundry Notes and Acceptances.....	32,478.92	
Sundry Salary Accounts—Officers and Employees.....	22,417.58	
Claim in Suspense.....	8,667.87	
	187,372.98	549,317.04
Total Liabilities		<u>\$645,704.32</u>
Capital and Surplus:		
Common Stock Issued.....	\$532,500.00	
Less: In Treasury.....	90,000.00	442,500.00
Surplus		229,601.49*
Total		<u><u>\$858,602.83</u></u>

*Indicates red figure.

Notes: (A) Stated at book cost; physical inventories not taken as at July 31, 1935.

(B) Stated at book values, subject to write-down for excess capital charges and insufficient depreciation and amortization taken in prior years.

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S. RAMON

Subscribed and sworn to before me this 14th day of October, 1935.

(Seal)

MARY D. F. HUDSON

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed with Spl Master Oct. 22, 1935.

[Endorsed]: Filed Feb. 19, 1936. [166]

[Title of District Court and Cause—No. 25937-S.]

ACCEPTANCE OF PLAN OF
REORGANIZATION

United States of America

District of Puerto Rico—ss.

The undersigned, being duly sworn, deposes and says:

That affiant hereby accepts the plan for the reorganization of The Joshua Hendy Iron Works, debtor corporation, pursuant to Section 77B of the Bankruptcy Act, filed in the above entitled proceeding on September 25, 1935, and duly noticed to be considered and heard before the Honorable W. A. Beasley, Special Master, on October 16, 1935.

Affiant is the owner of 607 G. M. S. shares of the capital stock of the debtor corporation, which the undersigned acquired without reference to said plan prior to July 1, 1934, and the interest of the undersigned will be affected by said plan.

GLADYS M. SHORES

(Verification)

[Endorsed]: Filed Feb. 19, 1936. [167]

[Title of District Court and Cause—No. 25937-S.]

ORDER CONFIRMING PLAN OF REORGANIZATION AND DIRECTING REORGANIZATION OF DEBTOR CORPORATION.

The creditors of The Joshua Hendy Iron Works, a corporation, hereinafter referred to as “debtor,” who filed the original petition herein for the reorganization of said debtor, having, together with Albertie M. Hendy, stockholder of said debtor, filed herein their proposed plan for the reorganization of said debtor, and the same having come on duly and regularly to be heard, pursuant to the order of this court, before Hon. W. A. Beasley and Hon. Burton J. Wyman, Special Masters herein, and said Special Masters having duly and regularly heard, considered, and reported the same, as hereinafter set forth, and notice thereof having been duly and regularly given, and the court being fully advised in the premises, it is found, ordered, adjudged, and declared as follows:

Jurisdiction.

1. That the above entitled proceeding was brought and is pending pursuant to the provisions of Sections 77A and 77B of the Act entitled “An Act to Establish a Uniform System of Bankruptcy Throughout the United States” approved July 1, 1898, and Acts amendatory thereof and supplementary thereto, hereinafter more generally referred to as the “Bankruptcy Act.”

2. That the debtor is, and at all times herein mentioned and for more than six months immediately preceding the filing of the creditors' petition for its reorganization herein, has been a corporation created, organized, and existing under and by virtue of the laws of the State of California and resident and with its principal place of business and principal assets within the territorial jurisdiction of the United States District Court for the Northern District of California, Southern Division; and that it is a business or commercial corporation and is not a municipal, railroad, insurance, or banking corporation, or a building and loan association. [168]

3. That no creditors having provable claims which amount in the aggregate, in excess of the value of securities held by them, if any, to \$1000.00 or over, and no creditors having claims, whether provable or not, in any amount whatsoever, and no stockholders holding outstanding shares of the capital stock of the debtor, did, prior to the hearing provided for in subdivision (c) of Clause 1 of Section 77B of the Bankruptcy Act, appear or controvert the facts alleged in the creditors' petition on file herein, nor at any other time, nor at all, and no answer to said petition has been filed save by the secretary of said debtor, and the receiver of said debtor appointed in a prior State equity receivership, both of which said answers admit the jurisdiction of this court in the premises.

4. That this court has jurisdiction in the above entitled cause and of the subject matter therein involved.

Preliminary Proceedings Had in the Above
Entitled Cause.

5. That on or about March 4, 1935, The Bank of California, National Association, a corporation, Moore Dry Dock Company, a corporation, and Baker-Hamilton & Pacific Company, a corporation, creditors of the debtor having provable claims against the debtor amounting in the aggregate, in excess of the value of the securities held by them to over \$1000.00, filed herein their petition under Section 77B of the Bankruptcy Act, which petition stated the requisite jurisdictional facts under said section 77B, and stated that no prior proceedings were then pending save and except an equity receivership of the debtor then pending in the Superior Court of the State of California, in and for the City and County of San Francisco, in an action instituted therein numbered 235979, entitled "Albertie M. Hendy, plaintiff, vs. The Joshua Hendy Iron Works, a corporation, et al., defendants"; that said petition further set forth facts showing, inter alia, the need for relief under said Section 77B from which it appeared that the debtor was unable to meet its debts as they matured, that the assets owned by the debtor, then in the hands of said receiver in equity, were of substantial value and had, when administered as a part of a going concern with the good will connected therewith, an earning power which should be preserved by a proceeding for the reorganization of the debtor for the benefit of the creditors of said debtor and other parties interested

therein, that the business of the debtor might be operated and reorganized to best advantage under the provisions of Section 77B of the Bankruptcy Act by a trustee appointed thereunder, and that said creditors desired to effect a plan of reorganization pursuant to the provisions of said Section 77B.

[169]

6. That on March 21, 1935, this court being satisfied that said petition was properly filed and filed in good faith, and that said petition complied in all respects with the provisions of Section 77B of the Bankruptcy Act, entered its order approving said petition as properly filed under said Section 77B.

7. That upon the application of said petitioning creditors this court, by its said order duly given and made on March 21, 1935, appointed W. R. Bassick as temporary trustee of the debtor in full possession, operation, and management of its estate, property, business, and assets, and directed said temporary trustee to give notice of such order to the creditors and stockholders of the debtor by mailing a copy of such notice to each of the creditors and stockholders of the debtor at their last known addresses as appearing upon the records of said debtor and/or its receiver, at least ten days prior to the date set for hearing thereon, and by publishing such notice once a week for two successive weeks in "The Recorder" a newspaper of general circulation printed and published in the City and County of San Francisco, State of California, and to notify said creditors and stockholders of a hearing to be held before this court

within thirty days after the approval of said creditors' petition and the order appointing said temporary trustee, to-wit, the 21st day of March, 1935, to determine whether or not the appointment of said temporary trustee should be made permanent or should be terminated and the receiver in said prior State equity receivership restored to possession, or whether or not said temporary trustee should be removed or any substitute trustee or additional trustee or trustees should be appointed by this court. That thereafter, and on March 22, 1935, said W. R. Bassick duly qualified as such temporary trustee and entered into full possession, operation, and management of the debtor and its estate, property, business, and assets, and continued as such temporary trustee until his appointment was made permanent, as hereinafter set forth. That said hearing was duly held by this court on the 19th day of April, 1935, at which hearing the petitioning creditors and the temporary trustee appeared by counsel and filed and caused to be entered in the records of the court due proof of the publication and mailing of said notice as required by law and said prior order of this court, and introduced evidence showing to the satisfaction of the court the necessity and desirability of making permanent the appointment of W. R. Bassick as trustee and continuing said permanent trustee in the possession, operation, and management of the business, property, assets, and estate of the debtor. No person appearing at said hearing to object, the court, being fully advised, did

by order duly given and made on the 19th day of April, 1935, make the appointment of said [170] W. R. Bassick, as trustee, permanent, and continued said permanent trustee in possession, operation, and management of the business, property, assets, and estate of the debtor, the court nevertheless reserving jurisdiction in the premises and reserving the right from time to time to amend, modify, extend, amplify, or restrict in any respect the power and authority thereby conferred upon said trustee and also reserving jurisdiction to have and exercise all powers not inconsistent with the provisions of said Section 77B. That said W. R. Bassick has been, ever since said date, and now is, the duly appointed, qualified, and acting trustee for the debtor, and as such trustee in full possession, operation, and management of its estate, property, business, and assets.

8. That in and by said order dated April 19, 1935, this court directed said trustee to cause notice to be given to the creditors and stockholders of the debtor by publication of such notice (in the form set forth in said order as corrected by order dated May 8, 1935) once a week for three successive weeks in "The Recorder", a newspaper of general circulation printed and published in the City and County of San Francisco, State of California, the first publication thereof to be made on or before the 24th day of May, 1935, and also by mailing notice thereof to each of the creditors and stockholders of the debtor at their last known addresses as ap-

pearing from the records of the debtor and/or its receiver, of the time set, sixty days after the first publication of said notice, within which the claims and interests of said creditors and stockholders might be filed or evidenced and after which no claim or interest might participate in any plan of reorganization consummated pursuant to Section 77B, and this court ordered the form in which said claims might be filed and the classes into which claims should be divided in accordance with the nature of their claims and interests. That said notice of time within which to file claims against the debtor was duly published and mailed and given in all respects as required by said order and by law; that the manner in which such claims and interests were so filed, evidenced, and allowed is hereby approved and the division of creditors and stockholders into classes as set forth in said order, according to the nature of their respective claims and interests, is hereby confirmed.

Plan of Reorganization.

9. That thereafter, and on September 25, 1935, the creditors of the debtor who filed the original petition herein for the reorganization of the debtor, together with Albertie M. Hendy, a stockholder of said debtor, filed herein their proposed plan for the reorganization of said debtor, a copy of which said proposed plan of reorganization is hereto [171] annexed, marked "Exhibit A", and incorporated herein by reference; and that said proposed plan

of reorganization fully and correctly sets forth, *inter alia*, the defaults and obligations of the debtor, its need for relief and reorganization, and the claims and interests affected by said plan.

10. That thereafter, and on September 30, 1935, this court duly gave and made its order appointing the Hon. W. A. Beasley Special Master herein, to hear, consider, and report upon said proposed plan of reorganization, and other matters specified in said order, and appointing the day, time, and place for the hearing and consideration of said proposed plan of reorganization before said Special Master, and directing said trustee to give notice of said hearing and determining the manner of the giving thereof. That notice of the hearing of said proposed plan of reorganization was duly and regularly given by said trustee mailing a notice thereof, together with a copy of said proposed plan of reorganization, more than ten days prior to the date of said hearing, to each of the stockholders and creditors of, and persons claiming an interest in, the debtor, at his or her address as the same appears on the books of the debtor, with regular postage thereon prepaid to each of those addressed within the State of California, and with airmail postage thereon prepaid to each of those addressed outside the State of California; and that said notice and the proof of mailing thereof on file herein are due, proper, reasonable, and sufficient and in accordance with law and said prior order of this court directing said notice.

11. That thereafter, and in accordance with said order, and on October 16, 1935, October 22, 1935, and October 28, 1935, hearings were held before the Hon. W. A. Beasley, as Special Master, for the consideration of said proposed plan of reorganization, whereat proofs were taken and examination was had.

12. That said proposed plan of reorganization is in the form required by law and is proposed and approved by creditors having aggregate claims comprising more than 10% in amount of all claims against the debtor and more than 20% of each of the several classes of claims against the debtor whose interests will be affected by said plan and by stockholders holding more than 10% of all of the stock of the debtor whose interests will be affected by said plan, and complies with the provisions of Section 77B of the Bankruptcy Act.

13. That said proposed plan of reorganization has been accepted in writing in the form required by law, and that such acceptances have been filed herein by creditors whose claims have been allowed [172] and will be affected by said proposed plan of reorganization, holding more than two-thirds in amount of the claims of each class, and by or on behalf of stockholders of the debtor whose interests will be affected by said proposed plan of reorganization, holding more than a majority of all of its outstanding stock; that said acceptances are properly verified and show what, if any, contracts of the debtor are executory in whole or in part, and what unexpired leases, if any, have been rejected and surrendered, and contain a verified statement show-

ing what, if any, claims and shares of stock have been purchased or transferred by those accepting the plan after the commencement or in contemplation of the above entitled proceeding, and the circumstances of such purchase or transfer; that no withdrawals of such acceptances have been filed herein; and that said proposed plan of reorganization has been fully and in all respects accepted as required by the provisions of Section 77B of the Bankruptcy Act.

14. That the acceptance of the proposed plan of reorganization filed herein by the Secretary of the Treasury requires, as a condition of its acceptance, that the order confirming said plan shall contain the following provisions with regard to the said claim of the United States:

“1. It is determined and ordered that the debtor is indebted to the United States for additional income taxes for the years 1927 and 1928 in the principal sum of \$2450.59, with legal interest thereon from April 18, 1931; and that the claim of the United States for such taxes and interest is entitled to priority over the debtor's security holders and shall be first fully paid before the debtor pays any monies to said security holders.

2. It is further ordered that the debtor shall pay such total sum (\$2450.59, with legal interest thereon from April 18, 1931) in six equal monthly installments, with interest at six per cent per annum on the respective un-

paid balances,—the first installment to be paid one month from the date hereof.

3. It appearing that the tax liability to the United States for 1934, and for 1935 to date of confirmation of the debtor's plan, is unascertainable at this time, it is ordered that if and when the proposed reorganization is effected and before a final decree is entered herein, the reorganized corporation shall assume any and all such liability still outstanding of the debtor to the United States of America and, in case of the determination of such liability, the claims of the United States for taxes shall have a priority over other creditors of the reorganized corporation of the same character and to the same extent as the United States [173] had against the assets of the debtor, and the reorganized corporation shall agree that the United States shall have the same remedies, powers and rights of collection against it as the Statutes have provided for collection from debtor and that the running of all statutes of limitation upon the collection of such claims, as are not already barred, shall be suspended during the time these proceedings are pending and in any event until all said tax claims for the years 1927 and 1928 are paid; and prior to the entry of a final decree in this proceeding the reorganized corporation shall place on record in this proceeding its written agreement embodying these undertakings. The court shall retain

jurisdiction over the assets herein dealt with and over any and all persons, firms, or corporations to whom said assets may be transferred, and over all parties appearing herein for the purpose of carrying out and giving effect to any and all provisions of the plan, to the decree confirming the same, and to orders entered herein, insofar as they affect and apply to the above tax claims of the United States of America.”

Such is the order of this court.

15. That written protests against said proposed plan of reorganization were filed by H. L. E. Meyer, Jr., a bondholder and unsecured creditor, represented by Williamson & Wallace, attorneys at law, and by Harold M. F. Behneman, a stockholder, represented by Byrne, Lamson & Jordan, attorneys at law, and that no other protests were filed against said proposed plan of reorganization; that the protest of said H. L. E. Meyer was subsequently withdrawn; and that the protest of said Harold M. F. Behneman, a stockholder, was fully presented and argued by his counsel and by counsel for the petitioning creditors and the trustee; and that it appears from the reporter’s transcript thereof that the Hon. W. A. Beasly, as Special Master, thereupon overruled and denied said protest.

16. That thereafter, and before his formal report had been filed with this Court, the Hon. W. A. Beasly died, and by order of this court duly given,

made, and entered on November 29, 1935, the Hon. Burton J. Wyman was appointed to succeed the Hon. W. A. Beasley as Special Master, with the same powers and duties. That thereafter, and on December 30, 1935, a further hearing upon said protest of said Harold M. F. Behneman was duly noticed and held, *de novo*, before the Hon. Burton J. Wyman, Special Master, at which hearing said Harold M. F. Behneman was represented by his said counsel and evidence was adduced and examination and argument had; that said protest of said Harold M. F. Behneman was thereupon submitted [174] upon written briefs, thereafter filed, to the Hon. Burton J. Wyman, Special Master; that thereupon and after full consideration thereof and of the evidence presented, the Hon. Burton J. Wyman, Special Master, duly and regularly reported and recommended to this court that said objection and protest of said Harold M. F. Behneman be overruled and denied; and that said protest of said Harold M. F. Behneman is hereby overruled and denied.

17. That the debtor is not a public utility corporation subject to the jurisdiction of regulatory commissions or other regulatory authorities created by the laws of the State of California, within which the properties of the debtor are operated and that, therefore, the provisions of subdivision (e), Clause 2, of Section 77B of the Bankruptcy Act are not applicable to the proceedings herein; that the debtor is subject to the Division of Corporations of the State of California, to whom it is contemplated that

necessary applications shall from time to time be made.

18. That the debtor is authorized by its charter or applicable State or Federal laws, upon confirmation of the proposed plan of reorganization, to take all action necessary to carry out said plan of reorganization.

Confirmation of Plan Decreed.

19. That said plan of reorganization is fair and equitable and does not discriminate unfairly in favor of or against any class of creditors or stockholders, and is feasible and will afford the debtor a reasonable opportunity for rehabilitation; that this is a proper case therefor and that it is to the advantage, benefit, and best interests of the debtor, and of all persons interested therein, that said plan of reorganization be, and it is hereby, approved and confirmed; and it is hereby ordered that reorganization of the debtor be had in accordance with the provisions of said plan of reorganization.

20. That said plan of reorganization complies fully with the provisions of subdivision (b) of Section 77B of the Bankruptcy Act; that all of the proceedings in connection with the preparation and the offer of said plan of reorganization and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by the Bankruptcy Act; that due and reasonable notice of all determinations and of all hearings has been given in all respects as required by Section 77B

of the Bankruptcy Act and by all orders of this court; that the debtor is hereby authorized and directed, and shall have power and authority subject to the order of this court, to put into effect and carry out said plan of reorganization [175] and the orders of this court relative thereto; and that said plan of reorganization and this order of confirmation shall be binding upon the debtor, and all stockholders of the debtor including those who have not as well as those who have accepted said plan, and all holders of bonds of the debtor including those who have not as well as those who have accepted said plan, and all other creditors of the debtor, secured of unsecured, whether or not affected by said plan, whether or not their claims shall have been filed (or if filed, whether or not approved), including creditors who have not as well as those who have accepted said plan, (provided that the United States of America shall not be bound in those particulars upon which its acceptance on file herein is specifically conditioned, as hereinabove set forth).

Fees and Expenses.

21. That save and except for such amounts as have been paid to the trustee, pursuant to the order of this court duly given and made on May 17, 1935, authorizing and directing an allowance of monthly compensation to the trustee on account of his compensation and fees to be finally allowed, nothing has been paid to the trustee, or his attorneys, or to

the attorneys for any of the interested parties, or to the Special Masters herein; and that in view of the additional services and expenses which will accrue prior to the termination of the above entitled proceeding, the determination of the amount of the fees and expenses to be paid by the debtor, including the fees, compensation, and expenses payable to the trustee and his attorneys, and to the Special Masters herein, is hereby deferred to be hereafter ordered and approved by the later order of this court.

Debtor Authorized to Carry Out Plan

22. That in order to effect said plan of reorganization the present directors of the debtor shall be, and they are hereby, removed from office and a new board of five directors appointed as provided in paragraph 7 of said plan of reorganization shall be, and they are hereby, immediately upon their election, constituted the Board of Directors of the debtor, in lieu of the present Board of Directors, hereby removed; that upon the appointment of the new Board of Directors of the debtor as in said plan provided, the debtor be, and it is hereby, authorized, empowered, and directed to forthwith reorganize and put into effect and carry out the provisions of said plan of reorganization and the orders of this court relative thereto, under and subject to the supervision and control of this court; and particularly to effect amendments of its articles

of incorporation and by-laws, cancel its existing notes, obligations and security, and issue its new [176] notes, obligations, and security therefor as provided in said plan of reorganization, and make such application to the Division of Corporations of the State of California as may be necessary or desirable.

23. In such connection, all of the creditors of the debtor affected by said plan of reorganization shall be, and they hereby are, directed to surrender to said trustee, any and all written evidences of obligations and security of the debtor held by them, and to receive in exchange therefor such new written obligations and security of the debtor as are provided in said plan of reorganization; and each of the stockholders of the debtor shall be and they are hereby directed to endorse and deliver the stock of the debtor held by them to the said trustee, for delivery by the trustee to the new Board of Directors of the debtor hereinabove provided, to be transferred and held by said Board of Directors as provided in paragraph 6G of said plan of reorganization.

Issuance and Transfer Taxes and Securities Act Exemption.

24. That the provisions of subdivisions 1, 2, and 3 of Schedule A of Title III of the Revenue Act of 1926, as amended by Sections 721, 722, and 723 of the Revenue Act of 1932, and the provisions of Sections 724 and 725 of the Revenue Act of 1932

shall not apply to the issuance, transfers, or exchanges of securities or obligations or the making or delivery of conveyances to make effective said plan of reorganization confirmed by this order. That each and all of the issuances, transfers, exchanges, surrenders, cancellations, conveyances, reconveyances, and discharges provided or contemplated by said plan of reorganization are hereby determined to be necessary and made to make said plan of reorganization effective.

25. All securities issued or to be issued pursuant to said plan of reorganization hereby confirmed shall be exempt from all of the provisions of the Securities Act of 1933, approved May 27, 1933, as amended, except the provisions of subdivision (2) of Section 12 and Section 17 thereof and except the provisions of Section 24 thereof as applied to any wilful violation of said Section 17. All securities issued by the debtor provided by said plan of reorganization shall be exempt securities within the meaning of this Section, and all such securities shall be and hereby are determined to be exempt securities. All receipts or counter-receipts issued by the debtor, trustee, or their agents for the purpose of carrying out and making said plan of reorganization effective, shall likewise be exempt securities as herein defined, and the debtor, trustee, and their agents are hereby [177] authorized and directed to issue any and all receipts or counter-receipts necessary or proper to carry out and make effective said plan of reorganization.

Trustee to Continue in Possession.

26. The order of this court dated April 19, 1935, making permanent the appointment of W. R. Bassick as trustee, and permanently continuing said trustee in possession of the assets, property, business, and estate of the debtor is hereby confirmed and approved and extended until the final determination and termination of the proceedings herein, and until the entry of the final order herein said trustee shall continue in possession of the assets, property, business, and estate of the debtor in all respects as provided in and by said order dated April 19, 1935, and shall have and exercise all the rights and powers and duties granted and conferred upon said trustee in and by said order. Said trustee is hereby authorized from time to time to apply to this court for such other and further orders and directions as the trustee may from time to time deem necessary or advisable in the conduct of the business and affairs of the debtor or in respect to the title to its assets, property, business, and estate and the possession thereof or otherwise in connection with the debtor's business or affairs or the proceedings herein taken.

Injunctions.

27. That all claims and demands against the debtor of whatever kind or nature, arising prior to May 17, 1932, excepting only such claims as are hereinabove expressly reserved to the United States of America, are hereby barred and enjoined,

and no such claims so barred and enjoined shall be enforced against the debtor and/or the trustee or against assets in the hands of the debtor and/or its trustee or any of the property of the debtor, nor shall the holders of any such claims be entitled to any claim against any property or assets of the debtor other than as set forth in said plan of reorganization hereby confirmed. The holders of all such claims and all persons claiming by or through them or any of them are hereby severally and respectively perpetually enjoined from prosecuting against said trustee and/or the debtor and/or any subsequent grantee, assignee, or transferee of either or both of them or against any property now owned or hereafter acquired by either or both of them, any claim, demand, suit, or proceeding arising out of or based upon any such claim or demand against, or liability of, the debtor, or otherwise, when seeking to impose liability upon the trustee and/or the debtor [178] and/or upon any grantee, assignee, or transferee of the debtor or upon any person or persons, corporation or corporations claiming by, under, or through either or both of them in respect of any claim, except pursuant to the provisions of, and in subordination to, this order. All property dealt with by said plan of reorganization and this order shall be free and clear of all claims of the debtor, its stockholders and creditors except pursuant to the provisions of and in subordination to this order.

Notice of Determination Herein Made.

28. That a copy of this order, which need not be certified, excluding "Exhibit A" (plan of reorganization, a copy of which has already been mailed to all creditors and stockholders, as aforesaid), be mailed by said trustee to each of the creditors and stockholders of the debtor affected by said plan of reorganization at their last known addresses within fifteen (15) days from the date hereof. Such mailing of a copy of this order shall constitute due notice to all creditors and stockholders of the debtor affected by said plan of reorganization of all determinations herein made, particularly of the order of this court requiring the surrender of all stock of the debtor and all written obligations and security of the debtor affected by this plan, as hereinabove provided, and no other notice thereof or in connection therewith need be given.

Reservation of Jurisdiction.

29. That all matters not determined by this order are reserved by this court for future determination. That the life of this order shall be for and during such term as may be necessary to fully consummate the provisions of the aforesaid plan of reorganization. That this court further reserves the right and retains exclusive power and jurisdiction, by appropriate order or orders hereafter entered, to provide for and carry out said plan of reorganization under and subject to the supervision and

control of this court, and hereby retains and shall have exclusive jurisdiction of the debtor and its property, wherever located, and shall have and may exercise all powers granted to it by law. That the trustee and debtor may from time to time apply to this court for such other order or orders as may be necessary to carry out and make effective this order confirming said plan of reorganization and the term of this court is hereby extended until the complete execution of the provisions of this order and until the entry of a final decree in the above entitled cause directing the trustee to transfer and convey the property dealt with by said plan of reorganization to the [179] debtor, discharging said trustee, and closing the above entitled proceeding.

Dated: March 24, 1936.

A. F. ST. SURE,

Judge of the United States District Court.

The foregoing order confirming plan of reorganization and directing reorganization of debtor corporation has been examined and, upon the hearing and examination had upon said plan of reorganization and the facts presented, I recommend that the same be made.

Dated: February 19, 1936.

BURTON J. WYMAN,

Special Master. [180]

“EXHIBIT A”

W. R. Bassick, Trustee for the Joshua Hendy Iron Works

BALANCE SHEET—AS AT JULY 31, 1935
(After giving effect to proposed Reorganization)

LIABILITIES

Current:

Accounts Payable	\$ 41,056.64
Note Payable, Bank of California—Secured.....	45,000.00
Accrued Salaries and Wages.....	1,523.95
Accrued Sales Tax.....	277.11
Accrued Property Tax.....	420.85
Federal Income Tax Deficiency and Interest, Class A.....	4,619.36
Claim of Carlo Lastreto, in Litigation.....	3,489.37
	<hr/>

\$ 96,387.28

Deferred:

Secured Five Years Notes Payable:

H. L. E. Meyer	Class B.....	\$ 9,945.00
Julia Routzahn	“ B.....	6,395.31
Bank of California, N. A.	“ B.....	258,198.75
Bank of California, N. A.	“ C.....	80,000.00
Bank of California, N. A.	“ D.....	7,405.00
		<hr/>

361,944.06

Unsecured Five Year Notes Payable, Class E:

Bank of California, N. A.....	100,022.60	
Sundry Trade Accounts.....	23,786.01	
Sundry Notes and Acceptances.....	32,478.92	
Sundry Salary Accounts—Officers and Employees.....	22,417.58	
Claim in Suspense.....	8,667.87	187,372.98
		<hr/>
Total Liabilities		\$645,704.32
Capital and Surplus:		
Common Stock Issued.....	\$532,500.00	
Less: In Treasury.....	90,000.00	442,500.00
		<hr/>
Surplus		229,601.49
		<hr/>
Total		<u>\$858,602.83</u>

Notes: (A) Stated at book cost; physical inventories not taken as at July 31, 1935.

(B) Stated at book values, subject to write-down for excess capital charges and insufficient depreciation and amortization taken in prior years.

[Endorsed]: Filed Mar. 24, 1936. [181]

[Title of District Court and Cause—No. 25937-S.]

FINAL DECREE APPROVING AND CONFIRMING REPORT OF EXECUTION AND ACCOMPLISHMENT OF CONFIRMED PLAN OF REORGANIZATION: SETTLING, APPROVING, AND CONFIRMING FINAL REPORT AND ACCOUNT OF TRUSTEE FOR DEBTOR: SETTLING AND ALLOWING CLAIMS, FEES, AND EXPENSES: DISCHARGING TRUSTEE FOR DEBTOR: AND TERMINATING AND CLOSING REORGANIZATION PROCEEDINGS.

W. R. Bassick, trustee for the debtor, having filed herein his verified final report and account as trustee for the debtor, report of execution and accomplishment of confirmed plan of reorganization, petition for settlement and allowance of claims, fees, and expenses and petition for final decree and discharge of trustee, and his verified supplement thereto, and Pillsbury, Madison & Sutro having filed herein their verified petition for fees as attorneys for the petitioning creditors, and Stanley Pedder and Kenneth Ferguson having filed herein their verified petition for fees as attorneys for said trustee, and the same having come on duly and regularly to be heard, pursuant to the order of this [182] Court, before the Honorable Burton J. Wyman, Special Master herein, and said Special Master having duly and regularly heard, considered, and reported the same,

and notice thereof having been duly and regularly given, and the Court being fully advised in the premises, it is found, ordered, adjudged and decreed as follows:

1. That W. R. Bassick is the duly and regularly appointed, qualified, and acting permanent trustee for the Joshua Hendy Iron Works, debtor corporation, and as such trustee is in full possession, operation, and management of the property and assets of said debtor corporation.

2. That on December 7, 1936, this Court made and gave its order fixing the time for the hearing of said reports, account and petitions and directing the form and manner of notice to be given of said hearing; that pursuant thereto, and on December 7, 1936, said trustee mailed notice of said hearing, in the form provided by this Court, to the known stockholders and creditors of the debtor affected by the plan of reorganization therefor heretofore confirmed, and to the trustee for the bondholders of the debtor, at their last known addresses or places of business as appearing upon the records of the debtor; that said notice was duly given and mailed in all respects as required by the order of this court and by law and that said notice and the proof of mailing thereof on file herein are due, proper, reasonable and sufficient.

3. That pursuant to said notice and the order of this Court, and on December 18, 1936, a hearing was held before the Honorable Burton J. Wyman, as Special Master, for the consideration and hearing of said reports, account, and petitions, whereat

proofs were taken and examination was had. [183]

4. That notice of said hearing and of this hearing has been given as required by the orders of this Court, and by law, and that said notice, and the proof of the giving thereof, are in all respects due, reasonable, proper, and sufficient.

5. That said reports, account, and petitions, and each of them, are verified and in the form required by law, and said petitions for attorneys' fees are supported by the affidavits required by law, and are true and correct and correctly set forth the services rendered and expenses incurred by the persons on whose behalf said petitions are filed.

6. That no protests or objections were filed against said reports, account, or petitions, or any of them, and that subsequent to said hearing and after full consideration thereof and of the evidence presented, the Honorable Burton J. Wyman, Special Master, duly and regularly reported and recommended to this Court his findings in connection therewith.

7. That since the filing of said reports, account, and petitions, the new unsecured five year note of the debtor payable to John Kitchen Jr., Co., in the principal sum of \$148.32, has been returned to said trustee, by the United States Post Office with addressee unfound, and said trustee is unable to locate the payee of said note; and S. J. Hendy has delivered to said trustee the remaining 25 shares of the capital stock of the debtor owned by him and referred to in said final report of said trustee. That as so amended all of the allegations of said reports,

account and petitions are true and correct and said final report and account of said trustee, and supplemental report, are hereby approved, confirmed, settled, and allowed, and all of the acts, [184] transactions, and proceedings of W. R. Bassick as temporary trustee and as permanent trustee herein are ratified, approved, and confirmed.

8. That Wells Fargo Bank & Union Trust Co., as trustee under debtor's former bond trust indenture, is hereby authorized and directed to cancel and destroy the First Mortgage Sinking Fund Twenty-Five Year Gold Bonds of the debtor, heretofore surrendered to it, by burning the same.

9. That said trustee is hereby authorized and directed to deliver to the debtor and the debtor is authorized and directed to hold its new unsecured five year notes dated March 24, 1936, and issue to Pacific Tire Sales Co., Ltd., in the principal sum of \$229.33, to Pacific Tire and Sales Co., in the principal sum of \$19.98, to Luana S. Maedi in the principal sum of \$42.98 and to John Kitchen Jr. Co., in the principal sum of \$148.32, and to deliver the same to said respective payees as and when the whereabouts of said respective payees are ascertained.

10. That all of the rights and interests of the owners and or holders of that certain capital stock of the debtor now outstanding upon its books in the name of F. J. Behneman, excepting such rights and interest therein as are provided in Paragraphs 6-G and 7 of the plan of reorganization heretofore confirmed, herein, are hereby terminated and ended,

and the owners and or holders of said capital stock are hereby directed to forthwith surrender the outstanding stock certificates therefor to the trustees provided in Paragraph 6-G of said plan of reorganization in exchange for said trustees' receipts and certificates as provided in said paragraph and heretofore confirmed and authorized herein; and it is hereby adjudged, determined, and decreed that the owners and or holders of said outstanding stock certificates have no right, title, or interest [185] therein, save the right to surrender said stock certificates to said trustees in exchange for the receipts and certificates of said trustees, as aforesaid.

11. That all of the acts and proceedings of the debtor and of the trustee for the debtor in this cause have conformed with the requirements of Sections 77A and 77B of the Act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and Acts amendatory thereof and supplementary thereto; and that the plan of reorganization heretofore confirmed and the orders of this court in connection therewith have been fully executed, carried out, and accomplished.

12. That, in consideration of the foregoing:

(a) The monthly allowance on account of compensation heretofore paid to W. R. Bassick, as trustee for the debtor, pursuant to the order of this court dated May 17, 1935, is hereby ratified and confirmed; and said trustee is hereby allowed the further sum of \$5000.00, over and above said monthly payment on account of

his compensation, in full payment of his compensation for the services rendered and to be rendered by him as such trustee in the above entitled proceeding;

(b) Stanley Pedder and Kenneth Ferguson are hereby allowed the sum of \$4500.00, in full payment for the services rendered by them to W. R. Bassick, as said trustee, as his attorneys, during the above entitled proceeding;

(c) The Honorable Burton J. Wyman, Special Master herein is hereby allowed the sum of \$25.00, in full payment of his fees for [186] services rendered by him, and the sum of \$16.25, in full payment of the fees of his stenographic reporter, and his office expenses and clerical services in connection with hearings held before him in the above entitled proceeding:

(d) Wells Fargo Bank & Union Trust Co., is hereby allowed the sum of \$505.00, in full payment of its claim filed, and for its services rendered, in the above entitled proceeding as trustee under debtor's trust indenture;

(e) Pillsbury, Madison & Sutro are hereby allowed the sum of \$1000.00, in full payment of their fees for services rendered by them in the above entitled proceeding as attorneys for the petitioning creditors herein.

That said fees and expenses are reasonable, proper, and necessarily and for the benefit of the debtor incurred herein.

13. That the trust of W. R. Bassick, as trustee for the debtor, is hereby settled and closed, and said trustee and his sureties are hereby released and discharged from all liability to be hereinafter incurred; and the debtor is hereby entitled to and vested with complete title and possession of all its property, free and clear of said trust.

14. That the debtor be, and it is hereby discharged from all debts, claims, and liabilities affected by the plan of reorganization heretofore confirmed.

15. That all creditors of, claimants against, and stockholders of the debtor affected by said plan of reorganization, wheresoever situated or domiciled, be, and they are hereby, restrained and enjoined from pursuing or attempting to pursue or commencing any suits or other proceedings at [187] law or in equity or otherwise against debtor and/or said trustee, or any of the assets or properties of the debtor, directly or indirectly, on account of or based upon any right, claim, or interest which any such creditor, claimant, or stockholder may have had in, to, or against the debtor.

16. That the proceedings for the corporate reorganization of the debtor in this court entitled "In the matter of The Joshua Hendy Iron Works, a corporation, debtor, No. 25937-S", be, and the same hereby are, terminated and closed; such termination and closing to be for all purposes final upon the filing herein of receipts showing the payment of the final fees and expenses hereinabove allowed, and

the surrender and exchange of the stock certificates which have not yet been surrendered and exchanged as provided in said plan of reorganization.

Dated: January 27, 1937.

A. F. ST. SURE

Judge.

The foregoing final decree, etc., has been examined, and, upon the hearing and examination had and the facts presented, I recommend that the same be made.

Dated: January 27, 1937.

BURTON J. WYMAN

Special Master.

[Endorsed]: Filed Jan. 27, 1937. [188]

In the United States District Court, Northern
District of California, Southern Division.

No. 25937-S

In the matter of

THE JOSHUA HENDY IRON WORKS

(whose name has been changed to HENDY
REALIZATION CO.), a corporation,

Debtor.

HENDY REALIZATION CO (formerly THE JOSHUA HENDY IRON WORKS), a corporation, A. J. MAYMAN, C. B. MOORES, E. H. PRICE, W. R. BASSICK, E. M. HYLAND, and MORRIS LEVIT,

Petitioners,

vs.

HAROLD M. F. BEHNEMAN and GLADYS M. SHORES,

Respondents.

PETITION FOR ORDER AIDING, ENFORCING, EFFECTUATING AND PROTECTING THE ADJUDICATION, ORDER, AND DECREE OF THE ABOVE ENTITLED COURT CONFIRMING PLAN OF REORGANIZATION AND DIRECTING REORGANIZATION OF DEBTOR PURSUANT THERETO, AND PREVENTING AND ENJOINING THE THREATENED INTERFERENCE WITH AND DEFEAT OF SAID ADJUDICATION, ORDER, AND DECREE AND THE JURISDICTION OF THE ABOVE ENTITLED COURT. [189]

To the Honorable, the District Court of the United States, in and for the Northern District of California, Southern Division:

Your petitioners herein respectfully allege and show:

I.

That your petitioner Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, is, and at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of California, and with its principal office and place of business within said State in the City and County of San Francisco, and within the territorial jurisdiction of the above entitled court, to-wit, in the Southern Division of the Northern District of California; that at all times herein mentioned, and until December 2, 1940, the name of petitioner corporation was The Joshua Hendy Iron Works, but that on December 2, 1940, pursuant to corporate proceedings duly had for such purpose the articles of incorporation of said corporation were duly amended so as change the name of petitioner corporation to Hendy Realization Co.; and that petitioners A. J. Mayman, C. B. Moores, E. H. Price, and W. R. Bassick are the duly appointed, qualified, and acting Directors of petitioner Hendy Realization Co. (hereinafter referred to as "petitioner corporation").

II.

That on March 4, 1935, the above entitled proceedings were filed and instituted by creditors of petitioner corporation for the reorganization of petitioner corporation as a debtor pursuant to the provisions of Sections 77A and 77B of the Act entitled "An Act to establish a uniform system of

bankruptcy throughout the United States," approved July 1, 1898, and Acts amendatory thereof and supplementary thereto, hereinafter more generally referred to as the "Bankruptcy Act."

III.

That pursuant and subsequent thereto such proceedings were [190] duly and regularly taken and had that a plan for the reorganization of petitioner corporation as debtor was duly presented, heard, and reported upon by the Hon. Burton J. Wyman, Special Master, and the above entitled court duly gave and made its Order dated March 24, 1936, confirming said plan of reorganization and directing the reorganization of your petitioner corporation, as debtor, pursuant thereto; that a true copy of said Order confirming said plan of reorganization and directing the reorganization of petitioner corporation is attached to this petition, marked "Exhibit A," and incorporated herein by reference, and that special reference is hereby made thereto for a full statement of the acts and proceedings taken and had prior thereto in the above entitled proceedings.

IV.

That said Order dated March 24, 1936, is still in full force and effect and expressly incorporates by reference the plan of reorganization thereby confirmed, and, by said incorporation, provides and directs, *inter alia*:

“G. Capital stock.

4425 shares of the capital stock of the debtor corporation are now outstanding, said shares having a book value of \$212,898.51, but no actual value.

In consideration of the extensions granted by the creditors and of the reduction of their claims in the sum of \$73,853.06, as aforesaid, the stockholders shall appropriately endorse and deliver the stock held by them to the Board of Directors of the debtor corporation, appointed as hereinafter provided, to be held by said Board as follows:

1. 50% of the shares so deposited by each stockholder shall be held in trust and voted by said Board for a period of 5 years, and thereafter until the extended obligations are fully paid, so as to leave the management of the debtor corporation during such period in the hands of its creditors. The Board shall have full power to vote said stock, including the power to vote for a reorganization of the capital structure of the debtor corporation so as to provide, at any time, for an issue of one or more classes of preferred stock and the exchange therefor of any part or all of the unsecured liabilities of the debtor corporation. Upon the expiration of 5 years and the payment [191] in full of the ex-

tended obligations, such shares shall be returned to their respective owners.

2. The remaining 50% of the shares so delivered by each stockholder shall be held by said Board free and clear of any claim, right, title, or interest therein by such stockholder to be distributed by said Board, in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company's affairs."

V.

That pursuant to said terms of said Order dated March 24, 1936, petitioner corporation's stockholders thereafter endorsed and delivered the outstanding stock held by them to petitioner corporation's Board of Directors to be held by said Board of Directors pursuant to said terms of said plan of reorganization and Order confirming the same; and that thereupon said Board of Directors as Voting Trustees issued their Voting Trust Certificates to each of said stockholders for 50% of the shares so deposited by such stockholders, and retained the remaining 50% of the shares so delivered by each stockholder, aggregating 2212½ shares, pursuant to said plan and Order, free and clear of any claim, right, title, or interest therein by such stockholders.

VI.

That said stock so surrendered by said stockholders had as found by said Order, no actual value

at said time; but that subsequent to said date the officers and management of petitioner corporation have so managed the affairs and business of petitioner corporation that they have become, and were on December 20, 1940, rehabilitated, sound, businesslike, and satisfactory in condition, and improved from the point where the stockholders of petitioner corporation had no equity, as aforesaid, to a point where the equity of petitioner corporation's stockholders has, and had upon December 20, 1940, become very substantial. That such successful [192] management of petitioner corporation's affairs has been had pursuant to arrangements made with petitioner corporation's managing officers immediately upon the giving and making of said Order dated March 24, 1936; that, notwithstanding the value of such services to petitioner corporation, the compensation of said managing officers was, by reason of such arrangements, not commensurate therewith; and that by said arrangement, and at divers intervening times, petitioner corporation represented to said managing officers that such compensation so received by them would be supplemented by the distribution of, and that as a reward and partial compensation for their management and successful rehabilitation of petitioner corporation's affairs petitioner corporation's Board of Directors, as aforesaid, would distribute, said capital stock of petitioner corporation so held by petitioner corporation's Board of Directors for said purpose pursuant to the terms of said Order dated March 24,

1936. That petitioners, and each of them, were fully advised of the terms of said Order dated March 24, 1936, and from and after said date acted in the light thereof and in reliance thereon; and that all of petitioner corporation's creditors and stockholders, including respondents, and each of them, have acquiesced in and have accepted benefits and advantages provided to them by said Order and the actions and proceedings taken and had by petitioner corporation and its Board of Directors pursuant thereto.

VII.

That accordingly, and on December 20, 1940, pursuant to the order, authority, and direction of said Order dated March 24, 1936, as aforesaid, petitioner corporation's Board of Directors, in special meeting duly assembled, and in the exercise of the sole discretion invested in it by said Order, unanimously adopted the following resolution, Director W. R. Bassick, however, expressly not participating in said vote. [193]

“Whereas, under the terms of the confirmed plan of reorganization of this corporation and the Voting Trust created pursuant thereto, 2212½ shares of the capital stock of this corporation are now held by this Board, as Voting Trustees, free and clear of any claim, right, title, or interest therein by the former stockholders surrendering the same, and subject to the distribution by this Board, in its sole dis-

cretion, either in whole or in part to the managing officers of this corporation as a reward for their management and the successful rehabilitation of the corporation's affairs; and

“Whereas, the officers of this corporation hereinafter named have, since its reorganization, rendered extremely valuable services to, and in the management of, the corporation, resulting in its rehabilitation as a sound and going business, and the improvement of the financial condition of the corporation from a point where the stockholders of the corporation had no equity, as evidenced by the records of the reorganization of the corporation under Section 77B of the Bankruptcy Act, to a point where the equity of the stockholders has become very substantial; and

“Whereas, the financial position, business, and affairs of this corporation have, since its reorganization, evidenced steady and substantial improvement to the point that they have become rehabilitated, sound, business-like, and satisfactory in condition, and such rehabilitation of the corporation's business so occasioned has made possible the advantageous sale of the Sunnyvale plant and properties of the corporation just consummated; and

“Whereas, notwithstanding the value of such services to this corporation, the compensation of such officers has not been commensurate therewith, and this Board through its Direc-

tors, has repeatedly represented to such officers that the compensation received by them during said period would be supplemented by additional reward as soon as in the opinion of the Board such further reward was practical and expedient; and

“Whereas, in addition, due to the sale of the corporation’s Sunnyvale plant and properties, the employment of certain of said officers has necessarily been severed, and their vacation and other rights interfered with; and

“Whereas, it appears just and proper that said 2212½ shares of the capital stock of this corporation held by this Board, as aforesaid, be issued to said managing officers, subject to the condition hereinafter set forth, as a reward for their successful management and rehabilitation of the corporation’s affairs; and it appears to be for the best interests of this corporation that the following resolution be adopted;

“Now Therefore, Be It Resolved, that this Board forthwith distribute said 2212½ shares of the capital stock of this corporation so held by it to the following persons in the respective amounts hereinafter set forth, in recognition, appreciation, payment, and reward for their exemplary and valuable services to this corporation and as [194] a reward for their management and the successful rehabilitation of the corporation’s affairs:

W. R. Bassick	812½ shares
E. M. Hyland	700 shares
M. Levit	700 shares;

provided, however, that each such person shall, prior to, and as a condition precedent to, receiving such distribution of stock, waive in writing the right of such person to receive any dividends or distribution upon said stock out of the first \$85,848.75 available for dividends or distribution upon the capital stock of this corporation, in dissolution or otherwise, so that the said sum of \$85,848.75 may be prorated and paid by way of dividend, distribution, or otherwise (or set aside for such payment), only to the holders of the remaining 1907¾ shares of the outstanding stock of the corporation now held by this Board as Voting Trustees, to the end that said persons holding said 2212½ shares hereby distributed shall only participate in dividends or distributions upon the capital stock of this corporation made in excess of said sum of \$85,848.75, as aforesaid.

“And Be It Further Resolved, that the President or Vice-President and the Secretary or Assistant Secretary of this corporation be and they are hereby authorized and directed, for and on behalf of this Board, to take all such steps and to execute all such documents as may be necessary or desirable to effectuate the distribution, transfer, and delivery of said stock to

said officers, as aforesaid, and to fully effectuate the purposes of this resolution.”

VIII.

That pursuant thereto, and to the terms of said Order dated March 24, 1936, said 2212½ shares of the capital stock of petitioner corporation, so held by the Board of Directors, were duly distributed to petitioner corporation's said managing officers as a reward for their management and said successful rehabilitation of petitioner corporation's affairs; 812½ of said shares being distributed to W. R. Bassick, petitioner's President, 700 shares thereof being distributed to E. M. Hyland, petitioner's Vice-President (in charge) of Manufacturing, and 700 shares thereof being issued to M. Levit, petitioner's Vice-President (in charge) of Sales, upon the terms and after the execution in writing by each of them of the waivers provided in said resolution. That said shares were so distributed to petitioner corporation's said [195] managing officers by petitioner corporation's Board of Directors, in the exercise of its sole discretion as a reward and partial compensation for their management of petitioner corporation's affairs so that they had become, and petitioners A. J. Mayman, C. B. Moores, E. H. Price, and W. R. Bassick, and A. E. Webber (now deceased), as petitioner corporation's Board of Directors, in the exercise of their sole discretion found them to be, successfully rehabilitated, sound, business like, and satisfactory in con-

dition; and were so distributed in express compliance with, and exercise and enforcement of, the order, authority, and direction of said Order dated March 24, 1936, and not otherwise; and that by so distributing said stock to said managing officers petitioner corporation's Board of Directors was enforcing and effectuating the authority and direction of said Order confirming plan of reorganization and securing and preserving the fruits and advantages thereof and carrying the same into effect.

IX.

That notwithstanding the terms and provisions of said Order dated March 24, 1936, and said action by petitioner corporation's Board of Directors pursuant thereto and in the enforcement thereof and on or about January 6, 1941, respondent Harold M. F. Behneman, one of petitioner corporation's stockholders, instituted an action in the Superior Court of the State of California in and for the City and County of San Francisco, entitled "Harold M. F. Behneman, plaintiff, vs. Hendy Realization Co., et al., defendants," and numbered therein 299573, and on or about January 17, 1941, respondent Gladys M. Shores instituted an action in the Superior Court of the State of California in and for the City and County of San Francisco, entitled "Gladys M. Shores, plaintiff, vs. Hendy Realization Co., et al., defendants," and numbered therein 299911, wherein and whereby said respondents, in each of said actions, seek to have it declared by

said Superior Court of the State of [196] California in and for the City and County of San Francisco:—that the distribution of said 2212½ shares to petitioners W. R. Bassick, E. M. Hyland, and Morris Levit, petitioner corporation's said managing officers, in compliance with said Order dated March 24, 1936, as aforesaid, was illegal and void; that said managing officers, and each of them, be ordered to surrender said 2212½ shares to petitioner corporation, and that said shares be cancelled and retired; that petitioner corporation's Directors be required to account for said 2212½ shares of stock so distributed, as aforesaid, together with all dividends thereon; and that petitioner corporation and its petitioning Directors be permanently restrained and enjoined from declaring or paying any liquidating or other dividends or payments from petitioner corporation's assets to petitioner stockholders holding said 2212½ shares so distributed. And that in and by said actions said respondents moreover seek to have the Superior Court of the State of California in and for the City and County of San Francisco construe and interpret the terms and provisions of said Order of the above entitled court dated March 24, 1936, as hereinabove set forth, particularly with reference to the distribution of said stock as aforesaid, and seek to have said State Superior Court declare and determine the rights and duties of the parties thereunder and the nature, extent, and effect of said Order of the above entitled court dated March 24, 1936.

X.

That the jurisdiction of the above entitled court in the premises, and in the subject matter of the above entitled proceedings, and in the interpretation, construction, effectuation, and enforcement of its said Order dated March 24, 1936, is sole and exclusive; and that said actions instituted by said respondents in the Superior Court of the State of California in and for the City and County of San Francisco, and each of them, constitute and are [197] an unwarranted and improper attack and attempted infringement of said sole and exclusive jurisdiction of the above entitled court and its said Order, and constitute and are an unwarranted and improper attempt to prevent and interfere with the enforcement and effectuation of said Order and Decree and to defeat said Order and Decree and its purposes and the rights and advantages adjudged and granted thereby. That said respondents, and each of them, threaten to continue and prosecute said actions unless restrained and enjoined there-against, and that, unless restrained and enjoined from so doing by this court, respondents, and each of them, will proceed with the prosecution of said actions and the taking of other actions designed to interfere with and defeat the terms, purpose, and enforcement of said Order dated March 24, 1936, and will seek to prevent and nullify the enforcement and effectuation thereof. That petitioners have no adequate remedy at law and that such actions and attack upon the Order of the above entitled court dated March 24, 1936, are of such na-

ture as to cause, unless restrained, great immediate and irreparable injury to petitioners, and to defeat the terms and spirit of said decree dated March 24, 1936.

XI.

That the determination of the effect of, and the enforcement and effectuation of, said decree dated March 24, 1936, is within the sole and exclusive jurisdiction and the exclusive province of the above entitled court, and that this is a proper case for the above entitled court to issue its injunction enjoining the continuance of said actions by respondents in the Superior Court of the State of California in and for the City and County of San Francisco, in aid of and to enforce and effectuate its own said decree dated March 24, 1936, and to secure and preserve the fruits and advantages thereof and to prevent the same from being defeated.

Wherefore, petitioner prays:

1. That an order be made and entered permanently staying, [198] restraining, and enjoining respondents Harold M. F. Behneman and Gladys M. Shores, and each of them, and their heirs, representatives, and assigns, from further proceeding with their said actions now pending in the Superior Court of the State of California in and for the City and County of San Francisco, and/or from taking or doing any and all acts, and/or from the commencement or continuation of any and all proceedings, interfering with or attacking said Order of this court dated March 24, 1936, or the enforce-

ment thereof, and/or said distribution of said 22121½ shares of the capital stock of petitioner corporation pursuant thereto, and/or the rights of petitioner distributees of said stock therein;

2. That such further order be made and entered as may be necessary to fully effectuate and enforce said Order dated March 24, 1936, and said distribution of stock pursuant thereto, and to protect and enforce the sole and exclusive jurisdiction of the above entitled court manifested thereby and in the premises; and

3. That petitioners have such other and further relief as may be meet and proper in the premises.

Respectfully submitted,

HENDY REALIZATION CO.

(formerly The Joshua Hendy
Iron Works), a corporation

By C. B. MOORES,

Vice-President

C. B. MOORES

A. J. MAYMAN

E. H. PRICE KF

W. R. BASSICK KF

E. M. HYLAND KF

MORRIS LEVIT KF

Petitioners.

STANLEY PEDDER AND

KENNETH FERGUSON

PILLSBURY, MADISON &
SUTRO

LONG & LEVIT

Attorneys for Petitioners. [199]

State of California,
City and County of San Francisco—ss.

C. B. Moores, being first duly sworn, deposes and says:

That he is an officer, to-wit, the Vice-President, of Hendy Realization Co. (formerly The Joshua Hendy Iron Works) a corporation, one of the petitioners in the foregoing petition, and as such is authorized to make this verification on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to such matters therein stated on information or belief, and as to those matters he believes the same to be true.

C. B. MOORES.

(Verification)

(Admission of Service) [200]

EXHIBIT A

[Title of District Court and Cause—No. 25,937-S.]
NOTICE OF CONFIRMATION OF PLAN OF
REORGANIZATION

Trustee's Notice and Letter of Instructions Letters
of Transmittal Order of Confirmation.

Notice

Together With Other Documents, a True Copy of
the Order of Confirmation of the Plan for the
Reorganization of the Joshua Hendy Iron
Works, Made and Entered March 24, 1936, by
Hon. A. F. St. Sure, Judge of the Above-En-
titled Court, Is Enclosed Herewith, Pursuant to
the Terms of Said Order of Confirmation, and
the Attention of All Creditors and Stockholders
of the Joshua Hendy Iron Works Affected by
the Plan of Reorganization Is Directed Thereto.

[201]

The Joshua Hendy Iron Works

San Francisco, California

March 28, 1936.

To the Creditors and Stockholders of The Joshua
Hendy Iron Works, debtor corporation, affected
by the plan for its reorganization.

Dear Sirs:

The plan of reorganization of The Joshua Hendy
Iron Works, debtor corporation, a copy of which
has heretofore been mailed to you and others, was

duly confirmed pursuant to the provisions of Section 77B of the Bankruptcy Act, as amended, by an order of confirmation duly given, made, and entered by the United States District Court in and for the Northern District of California, Southern Division, on March 24, 1936, and will be consummated as soon as possible. The order of confirmation, a copy of which is contained in the folder of which this letter and notice is a part, is an assurance that the plan of reorganization will be carried into effect, since Subdivision (g) of said Section 77B, provides as follows:

“(g) Upon such confirmation the provisions of the plan and of the order of confirmation shall be binding upon (1) the debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) all creditors, secured or unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it.”

In order to expedite the consummation of said plan of reorganization, you are hereby notified:

1. That a meeting will be held in the office of the undersigned, trustee for the debtor corporation, Room 72, 206 Sansome Street, San Francisco, California, on April 8, 1936, at 11 o'clock, A. M., of said day, for the purpose of

electing a new Board of Directors of the debtor corporation, five in number, as provided in Section 22 of the order of confirmation and Paragraph 7 of the plan of reorganization;

and all of the creditors affected by the plan of reorganization are notified:

2. To immediately execute the transmittal letter printed on blue paper, designated "Letter of Transmittal for Creditors," and contained in the folder of which this letter and notice is a part; and, after complying with the instructions set forth in said letter, to immediately forward said letter *together with any and all written evidences of obligations and securities of the debtor corporation held by them,** to the undersigned, trustee for the debtor corporation, by registered mail addressed to W. R. Bassick, Trustee for The Joshua Hendy Iron Works, Room 702, 206 Sansome Street, San Francisco, California. The undersigned will hold such written evidences of obligations and securities of the debtor corporation so received [202] by him, as trustee, and will, pursuant to the provisions of Section 23 of the order of confirmation, exchange the same for, and in due course deliver to you, such new written obligations and securities of the debtor corporation as are provided in the plan of reor-

*Italics in original document.

ganization. In the event that creditors affected by the plan of reorganization do not hold any written evidences of obligations or securities of the debtor corporation, it will not be necessary for them to forward said transmittal letter;

and all of the stockholders are notified:

3. To immediately execute the transmittal letter printed on yellow paper, designated "Letter of Transmittal for Stockholders," and contained in the folder of which this letter and notice is a part; and to endorse all stock certificates of the debtor corporation held by them to "W. R. Bassick, Trustee"; and, after complying with the instructions set forth in said letter and endorsing said certificates of stock, to immediately forward said letter, *together with all of said endorsed stock certificates,** to the undersigned, trustee for the debtor corporation, by registered mail addressed to W. R. Bassick, Trustee for The Joshua Hendy Iron Works Room 702, 206 Sansome Street, San Francisco, California. The undersigned will hold such stock so received by him, as trustee, and will in due course, pursuant to the provisions of Section 23 of the order of confirmation, deliver the same to the new Board of Directors of the debtor corporation to be trans-

*Italics in original document.

ferred and held by said Board as provided in paragraph 6G of the plan of reorganization.

This letter and notice is given pursuant to the provisions of Section 28 of the order of confirmation, to which you are referred for full and further particulars.

Very truly yours,

W. R. BASSICK,

Trustee for The Joshua Hendy
Iron Works, debtor corporation.

STANLEY PEDDER,

KENNETH FERGUSON,

Financial Center Building,

Attorneys for Trustee. [203]

LETTER OF TRANSMITTAL FOR
CREDITORS

(on Blue paper.)

Mr. W. R. Bassick,

Trustee for The Joshua Hendy Iron Works,

Room 702,

206 Sansome Street,

San Francisco, California.

Dear Sir:

The undersigned, one of the creditors of The Joshua Hendy Iron Works, debtor corporation, is the owner or holder of, and delivers to you here-

with, written evidences of obligations and/or securities of said debtor corporation, affected by the plan of reorganization, as follows:

You are hereby authorized and empowered with respect thereto as follows:

(a) To deliver said written evidences of obligations and/or securities to the debtor corporation (or, in the case of First Mortgage 6% Sinking Fund 25 Year Gold Bonds, to the trustee under the Trust Indenture securing said bonds) for cancellation; and in due course

(b) To receive therefor from the debtor, and forward to the undersigned, notes in the amount and upon the security, if any, provided in the plan of reorganization of the debtor confirmed by Order of Court dated March 24, 1936.

Please cause such note or notes, and security if such is provided in the plan of reorganization, to be issued in the following name and forwarded to the undersigned at the following address:

.....
Name Street Address City State

Very truly yours,
.....

Instructions

Fill out and sign the above letter of transmittal and forward the same by registered mail together with the written evidences of obligations and/or securities to be described therein, to W. R. Bassick,

Trustee for The Joshua Hendy Iron Works, Room 702, 206 Sansome Street, San Francisco, California.

If the above letter of transmittal is executed by a trustee, attorney, executor, administrator, guardian, or other person acting in a representative or fiduciary capacity, proper evidence of authority so to act must be attached to said letter of transmittal. [204]

LETTER OF TRANSMITTAL FOR
STOCKHOLDERS

(on Yellow paper)

Mr. W. R. Bassick,
Trustee for The Joshua Hendy Iron Works,
Room 702, 206 Sansome Street,
San Francisco, California.

Dear Sir:

The undersigned is the owner and holder of, and has endorsed to you as trustee and delivers to you herewith,..... shares of the capital stock of The Joshua Hendy Iron Works, debtor corporation, standing of record as follows:

You are hereby authorized and empowered with respect to the stock delivered to you herewith as follows:

(a) When the new Board of Directors of the debtor corporation is appointed as provided in Section 22 of the order of confirmation, dated March 24, 1936, you shall endorse and deliver said stock

to said new Board of Directors, and shall direct, and the undersigned hereby authorizes, said new Board of Directors:

(1) to hold 50% of said stock in trust, the undersigned hereby appointing said new Board of Directors as trustees, to be voted by said Board for a period of five years and thereafter until the extended obligations of the debtor corporation issued pursuant to the plan of reorganization are fully paid, so as to leave the management of the debtor corporation during such period in the hands of its creditors holding such extended obligations. During such period said Board shall have full power to vote said stock, including the power to vote for a reorganization of the capital structure of the debtor corporation so as to provide, at any time, for an issue of one or more classes of preferred stock and the exchange therefor of any part or all of the unsecured liabilities of the debtor corporation. Upon the expiration of five years and the payment in full of all of the debtor corporation's extended obligations, as aforesaid, such shares shall be returned to the undersigned or his or her order;

(2) to hold the remaining 50% of said stock free and clear of any claim, right, title, or interest therein by the undersigned or anyone claiming through him, or her, such stock to be distributed by said Board, in its sole discretion,

either in whole or in part, to the managing officers of the debtor corporation as a reward for management and the successful rehabilitation of the debtor corporations' affairs;

(3) to cause all or any part of said stock to be transferred to said Board as trustees upon the books of the corporation, as it may elect;

(b) Upon the delivery of such stock to said new Board of Directors you shall procure from said Board, as Trustees and forward to the undersigned, a receipt for 50% of said stock, as aforesaid, acknowledging that said Board holds said 50% of said stock in trust for the undersigned or his or her order upon the trust hereinabove outlined, said receipt to set forth the conditions of said trust.

Please cause such receipt to be issued in the following name and forwarded to the undersigned at the following address:

.....
Name Street Address City State

Very truly yours,
.....

Instructions

Fill out and sign the above letter of transmittal and forward the same by registered mail together with the stock certificates to be described therein to W. R. Bassick, Trustee for The Joshua Hendy Iron Works, Room 702, 206 Sansome Street, San Francisco, California.

If the above letter of transmittal is executed by a trustee, attorney, executor, administrator, guardian, or other person acting in a representative or fiduciary capacity, proper evidence of authority so to act must be attached to said letter of transmittal.

Under the provisions of Sections 24 and 25 of the order of confirmation, no stamp transfer taxes are payable with respect to the foregoing deposit. If, however, it is requested that any receipt evidencing beneficial ownership in 50% of the shares deposited, as aforesaid, be issued to anyone other than the person in whose name the stock being deposited stands, a stamp transfer tax of Four Cents (4¢) per share is payable upon each of such shares, and your check therefor should accompany the foregoing letter of transmittal. [205]

[Title of District Court and Cause—No. 25937-S.]

ORDER CONFIRMING PLAN OF REORGANIZATION AND DIRECTING REORGANIZATION OF DEBTOR CORPORATION.

The creditors of The Joshua Hendy Iron Works, a corporation, hereinafter referred to as “debtor,” who filed the original petition herein for the reorganization of said debtor, having, together with Albertie M. Hendy, stockholder of said debtor, filed herein their proposed plan for the reorganization of said debtor, and the same having come on duly and regularly to be heard, pursuant to the order

of this court, before Hon. W. A. Beasley and Hon. Burton J. Wyman, Special Masters herein, and said Special Masters having duly and regularly heard, considered, and reported the same, as hereinafter set forth, and notice thereof having been duly and regularly given, and the court being fully advised in the premises, it is found, ordered, adjudged, and decreed as follows:

Jurisdiction.

1. That the above entitled proceeding was brought and is pending pursuant to the provisions of Sections 77A and 77B of the Act entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States" approved July 1, 1898, and Acts amendatory thereof and supplementary thereto, hereinafter more generally referred to as the "Bankruptcy Act."

2. That the debtor is, and at all times herein mentioned and for more than six months immediately preceding the filing of the creditors' petition for its reorganization herein, has been a corporation created, organized, and existing under and by virtue of the laws of the State of California and resident and with its principal place of business and principal assets within the territorial jurisdiction of the United States District Court for the Northern District of California, Southern Division; and that it is a business or commercial corporation and is not a municipal, railroad, insurance, or banking corporation, or a building and loan association. [206]

3. That no creditors having provable claims which amount in the aggregate, in excess of the value of securities held by them, if any, to \$1000.00 or over, and no creditors having claims, whether provable or not, in any amount whatsoever, and no stockholders holding outstanding shares of the capital stock of the debtor, did, prior to the hearing provided for in subdivision (c) of Clause 1 of Section 77B of the Bankruptcy Act, appear or controvert the facts alleged in the creditors' petition on file herein, nor at any other time, nor at all, and no answer to said petition has been filed save by the secretary of said debtor, and the receiver of said debtor appointed in a prior State equity receivership, both of which said answers admit the jurisdiction of this court in the premises.

4. That this court has jurisdiction in the above entitled cause and of the subject matter therein involved.

Preliminary Proceedings Had in the Above
Entitled Cause.

5. That on or about March 4, 1935, The Bank of California, National Association, a corporation, Moore Dry Dock Company, a corporation, and Baker-Hamilton & Pacific Company, a corporation, creditors of the debtor having provable claims against the debtor amounting in the aggregate, in excess of the value of the securities held by them to over \$1000.00, filed herein their petition under Section 77B of the Bankruptcy Act, which petition

stated the requisite jurisdictional facts under said section 77B, and stated that no prior proceedings were then pending save and except an equity receivership of the debtor then pending in the Superior Court of the State of California, in and for the City and County of San Francisco, in an action instituted therein numbered 235979, entitled "Albertie M. Hendy, plaintiff, vs. The Joshua Hendy Iron Works, a corporation, et al., defendants"; that said petition further set forth facts showing, inter alia, the need for relief under said Section 77B from which it appeared that the debtor was unable to meet its debts as they matured, that the assets owned by the debtor, then in the hands of said receiver in equity, were of substantial value and had, when administered as a part of a going concern with the good will connected therewith, an earning power which should be preserved by a proceeding for the reorganization of the debtor for the benefit of the creditors of said debtor and other parties interested therein, that the business of the debtor might be operated and reorganized to best advantage under the provisions of Section 77B of the Bankruptcy Act by a trustee appointed thereunder, and that said creditors desired to effect a plan of reorganization pursuant to the provisions of said Section 77B. [207]

6. That on March 21, 1935, this court being satisfied that said petition was properly filed and filed in good faith, and that said petition complied in all respects with the provisions of Section 77B of the

Bankruptcy Act, entered its order approving said petition as properly filed under said Section 77B.

7. That upon the application of said petitioning creditors this court, by its order duly given and made on March 21, 1935, appointed W. R. Bassick as temporary trustee of the debtor in full possession, operation, and management of its estate, property, business, and assets, and directed said temporary trustee to give notice of such order to the creditors and stockholders of the debtor by mailing a copy of such notice to each of the creditors and stockholders of the debtor at their last known addresses as appearing upon the records of said debtor and/or its receiver, at least ten days prior to the date set for hearing thereon, and by publishing such notice once a week for two successive weeks in "The Recorder" a newspaper of general circulation printed and published in the City and County of San Francisco, State of California, and to notify said creditors and stockholders of a hearing to be held before this court within thirty days after the approval of said creditors' petition and the order appointing said temporary trustee, to-wit, the 21st day of March, 1935, to determine whether or not the appointment of said temporary trustee should be made permanent or should be terminated and the receiver in said prior State equity receivership restored to possession, or whether or not said temporary trustee should be removed or any substitute trustee or additional trustee or trustees should be appointed by this court. That thereafter, and on

March 22, 1935, said W. R. Bassick duly qualified as such temporary trustee and entered into full possession, operation, and management of the debtor and its estate, property, business, and assets, and continued as such temporary trustee until his appointment was made permanent, as hereinafter set forth. That said hearing was duly held by this court on the 19th day of April, 1935, at which hearing the petitioning creditors and the temporary trustee appeared by counsel and filed and caused to be entered in the records of the court due proof of the publication and mailing of said notice as required by law and said prior order of this court, and introduced evidence showing to the satisfaction of the court the necessity and desirability of making permanent the appointment of W. R. Bassick as trustee and continuing said permanent trustee in the possession, operation, and management of the business, property, assets, and estate of the debtor. No person appearing at said hearing to object, the court, being fully advised, did by order duly given and made on the 19th day of April, 1935, make the appointment of said [208] W. R. Bassick, as trustee, permanent, and continued said permanent trustee in possession, operation, and management of the business, property, assets, and estate of the debtor, the court nevertheless reserving jurisdiction in the premises and reserving the right from time to time to amend, modify, extend, amplify, or restrict in any respect the power and authority thereby conferred upon said trustee and also re-

serving jurisdiction to have and exercise all powers not inconsistent with the provisions of said section 77B. That said W. R. Bassick has been, ever since said date, and now is, the duly appointed, qualified, and acting trustee for the debtor, and as such trustee in full possession, operation, and management of its estate, property, business, and assets.

8. That in and by said order dated April 19, 1935, this court directed said trustee to cause notice to be given to the creditors and stockholders of the debtor by publication of such notice (in the form set forth in said order as corrected by order dated May 8, 1935) once a week for three successive weeks in "The Recorder", a newspaper of general circulation printed and published in the City and County of San Francisco, State of California, the first publication thereof to be made on or before the 24th day of May, 1935, and also by mailing notice thereof to each of the creditors and stockholders of the debtor at their last known addresses as appearing from the records of the debtor and/or its receiver, of the time set, sixty days after the first publication of said notice, within which the claims and interests of said creditors and stockholders might be filed or evidenced and after which no claim or interest might participate in any plan of reorganization consummated pursuant to Section 77B, and this court ordered the form in which said claims might be filed and the classes into which claims should be divided in accordance with the nature of their claims and interests. That said no-

tice of time within which to file claims against the debtor was duly published and mailed and given in all respects as required by said order and by law; that the manner in which such claims and interests were so filed, evidenced, and allowed is hereby approved and the division of creditors and stockholders into classes as set forth in said order, according to the nature of their respective claims and interests, is hereby confirmed.

Plan of Reorganization.

9. That thereafter, and on September 25, 1935, the creditors of the debtor who filed the original petition herein for the reorganization of the debtor, together with Albertie M. Hendy, a stockholder of said debtor, filed herein their proposed plan for the reorganization of said debtor, a copy of which said proposed plan of reorganization is hereto [209] annexed, marked "Exhibit A", and incorporated herein by reference; and that said proposed plan of reorganization fully and correctly sets forth, inter alia, the defaults and obligations of the debtor, its need for relief and reorganization, and the claims and interests affected by said plan.

10. That thereafter, and on September 30, 1935, this court duly gave and made its order appointing the Hon. W. A. Beasley Special Master herein, to hear, consider, and report upon said proposed plan of reorganization, and other matters specified in said order, and appointing the day, time, and place for the hearing and consideration of said proposed

plan of reorganization before said Special Master, and directing said trustee to give notice of said hearing and determining the manner of the giving thereof. That notice of the hearing of said proposed plan of reorganization was duly and regularly given by said trustee mailing a notice thereof, together with a copy of said proposed plan of reorganization, more than ten days prior to the date of said hearing, to each of the stockholders and creditors of, and persons claiming an interest in, the debtor, at his or her address as the same appears on the books of the debtor, with regular postage thereon prepaid to each of those addressed within the State of California, and with airmail postage thereon prepaid to each of those addressed outside the State of California; and that said notice and the proof of mailing thereof on file herein are due, proper, reasonable, and sufficient and in accordance with law and said prior order of this court directing said notice.

11. That thereafter, and in accordance with said order, and on October 16, 1935, October 22, 1935, and October 28, 1935, hearings were held before the Hon. W. A. Beasly, as Special Master, for the consideration of said proposed plan of reorganization, whereat proofs were taken and examination was had.

12. That said proposed plan of reorganization is in the form required by law and is proposed and approved by creditors having aggregate claims comprising more than 10% in amount of all claims against the debtor and more than 20% of each of

the several classes of claims against the debtor whose interests will be affected by said plan, and by stockholders holding more than 10% of all of the outstanding stock of the debtor whose interests will be affected by said plan, and complies with the provisions of Section 77B of the Bankruptcy Act.

13. That said proposed plan of reorganization has been accepted in writing in the form required by law, and that such acceptances have been filed herein by creditors whose claims have been allowed [210] and will be affected by said proposed plan of reorganization, holding more than two-thirds in amount of the claims of each class, and by or on behalf of stockholders of the debtor whose interests will be affected by said proposed plan of reorganization, holding more than a majority of all of its outstanding stock; that said acceptances are properly verified and show what, if any, contracts of the debtor are executory in whole or in part, and what unexpired leases, if any, have been rejected and surrendered, and contain a verified statement showing what, if any, claims and shares of stock have been purchased or transferred by those accepting the plan after the commencement or in contemplation of the above entitled proceeding, and the circumstances of such purchase or transfer; that no withdrawals of such acceptances have been filed herein; and that said proposed plan of reorganization has been fully and in all respects accepted as required by the provisions of Section 77B of the Bankruptcy Act.

14. That the acceptance of the proposed plan of reorganization filed herein by the Secretary of the Treasury requires, as a condition of its acceptance, that the order confirming said plan shall contain the following provisions with regard to the said claim of the United States:

“1. It is determined and ordered that the debtor is indebted to the United States for additional income taxes for the years 1927 and 1928 in the principal sum of \$2450.59, with legal interest thereon from April 18, 1931; and that the claim of the United States for such taxes and interest is entitled to priority over the debtor's security holders and shall be first fully paid before the debtor pays any monies to said security holders.

2. It is further ordered that the debtor shall pay such total sum (\$2450.59, with legal interest thereon from April 18, 1931) in six equal monthly installments, with interest at six per cent per annum on the respective unpaid balances,—the first installment to be paid one month from the date hereof.

3. It appearing that the tax liability to the United States for 1934, and for 1935 to date of confirmation of the debtor's plan, is unascertainable at this time, it is ordered that if and when the proposed reorganization is effected and before a final decree is entered herein, the reorganized corporation shall assume any and all such liability still outstanding of the debtor

to the United States of America and, in case of the determination of such liability, the claims of the United States for taxes shall have a priority over other creditors of the reorganized corporation of the same character and to the same extent as the United States [211] had against the assets of the debtor, and the reorganized corporation shall agree that the United States shall have the same remedies, powers and rights of collection against it as the Statutes have provided for collection from debtor and that the running of all statutes of limitation upon the collection of such claims, as are not already barred, shall be suspended during the time these proceedings are pending and in any event until all said tax claims for the years 1927 and 1928 are paid; and prior to the entry of a final decree in this proceeding the reorganized corporation shall place on record in this proceeding its written agreement embodying these undertakings. The court shall retain jurisdiction over the assets herein dealt with and over any and all persons, firms, or corporations to whom said assets may be transferred, and over all parties appearing herein for the purpose of carrying out and giving effect to any and all provisions of the plan, to the decree confirming the same, and to orders entered herein, insofar as they affect and apply to the above tax claims of the United States of America."

Such is the order of this court.

15. That written protests against said proposed plan of reorganization were filed by H. L. E. Meyer, Jr., a bondholder and unsecured creditor, represented by Williamson & Wallace, attorneys at law, and by Harold M. F. Behneman, a stockholder, represented by Byrne, Lamson & Jordan, attorneys at law, and that no other protests were filed against said proposed plan of reorganization; that the protest of said H. L. E. Meyer was subsequently withdrawn; and that the protest of said Harold M. F. Behneman, a stockholder, was fully presented and argued by his counsel and by counsel for the petitioning creditors and the trustee; and that it appears from the reporter's transcript thereof that the Hon. W. A. Beasly, as Special Master, thereupon overruled and denied said protest.

16. That thereafter, and before his formal report had been filed with this Court, the Hon. W. A. Beasly died, and by order of this court duly given, made, and entered on November 29, 1935, the Hon. Burton J. Wyman was appointed to succeed the Hon. W. A. Beasly as Special Master, with the same powers and duties. That thereafter, and on December 30, 1935, a further hearing upon said protest of said Harold M. F. Behneman was duly noticed and held, de novo, before the Hon. Burton J. Wyman, Special Master, at which hearing said Harold M. F. Behneman was represented by his said counsel and evidence was adduced and examination and argument had; that said protest of said Harold M. F. Behneman was thereupon submitted [212] up-

on written briefs, thereafter filed, to the Hon. Burton J. Wyman, Special Master; that thereupon and after full consideration thereof and of the evidence presented, the Hon. Burton J. Wyman, Special Master, duly and regularly reported and recommended to this court that said objection and protest of said Harold M. F. Behneman be overruled and denied; and that said protest of said Harold M. F. Behneman is hereby overruled and denied.

17. That the debtor is not a public utility corporation subject to the jurisdiction of regulatory commissions or other regulatory authorities created by the laws of the State of California, within which the properties of the debtor are operated and that, therefore, the provisions of subdivision (e), Clause 2, of Section 77B of the Bankruptcy Act are not applicable to the proceedings herein; that the debtor is subject to the Division of Corporations of the State of California, to whom it is contemplated that necessary applications shall from time to time be made.

18. That the debtor is authorized by its charter or applicable State or Federal laws, upon confirmation of the proposed plan of reorganization, to take all action necessary to carry out said plan of reorganization.

Confirmation of Plan Decreed.

19. That said plan of reorganization is fair and equitable and does not discriminate unfairly in favor of or against any class of creditors or stockholders,

and is feasible and will afford the debtor a reasonable opportunity for rehabilitation; that this is a proper case therefor and that it is to the advantage, benefit, and best interests of the debtor, and of all persons interested therein, that said plan of reorganization be, and it is hereby, approved and confirmed; and it is hereby ordered that reorganization of the debtor be had in accordance with the provisions of said plan of reorganization.

20. That said plan of reorganization complies fully with the provisions of subdivision (b) of Section 77B of the Bankruptcy Act; that all of the proceedings in connection with the preparation and the offer of said plan of reorganization and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by the Bankruptcy Act; that due and reasonable notice of all determinations and of all hearings has been given in all respects as required by Section 77B of the Bankruptcy Act and by all orders of this court; that the debtor is hereby authorized and directed, and shall have power and authority subject to the order of this court, to put into effect and carry out said plan of reorganization [213] and the orders of this court relative thereto; and that said plan of reorganization and this order of confirmation shall be binding upon the debtor, and all stockholders of the debtor including those who have not as well as those who have accepted said plan, and all holders of bonds of the debtor including those who have not as well as those who have ac-

cepted said plan, and all other creditors of the debtor, secured or unsecured, whether or not affected by said plan, whether or not their claims shall have been filed (or if filed, whether or not approved), including creditors who have not as well as those who have accepted said plan, (provided that the United States of America shall not be bound in those particulars upon which its acceptance on file herein is specifically conditioned, as hereinabove set forth).

Fees and Expenses.

21. That save and except for such amounts as have been paid to the trustee, pursuant to the order of this court duly given and made on May 17, 1935, authorizing and directing an allowance of monthly compensation to the trustee on account of his compensation and fees to be finally allowed, nothing has been paid to the trustee, or his attorneys, or to the attorneys for any of the interested parties, or to the Special Masters herein; and that in view of the additional services and expenses which will accrue prior to the termination of the above entitled proceeding, the determination of the amount of the fees and expenses to be paid by the debtor, including the fees, compensation, and expenses payable to the trustee and his attorneys, and to the Special Masters herein, is hereby deferred to be hereafter ordered and approved by the later order of this court.

Debtor Authorized to Carry Out Plan.

22. That in order to effect said plan of reorganization the present directors of the debtor shall be, and they are hereby, removed from office and a new board of five directors appointed as provided in paragraph 7 of said plan of reorganization shall be, and they are hereby, immediately upon their election, constituted the Board of Directors of the debtor, in lieu of the present Board of Directors, hereby removed; that upon the appointment of the new Board of Directors of the debtor as in said plan provided, the debtor be, and it is hereby, authorized, empowered, and directed to forthwith reorganize and put into effect and carry out the provisions of said plan of reorganization and the orders of this court relative thereto, under and subject to the supervision and control of this court; and particularly to effect amendments of its articles of incorporation and by-laws, cancel its existing notes, obligations and security, and issue its new [214] notes, obligations, and security therefor as provided in said plan of reorganization, and make such application to the Division of Corporations of the State of California as may be necessary or desirable.

23. In such connection, all of the creditors of the debtor affected by said plan of reorganization shall be, and they hereby are, directed to surrender to said trustee, any and all written evidences of obligations and security of the debtor held by

them, and to receive in exchange therefor such new written obligations and security of the debtor as are provided in said plan of reorganization; and each of the stockholders of the debtor shall be and they are hereby directed to endorse and deliver the stock of the debtor held by them to the said trustee, for delivery by the trustee to the new Board of Directors of the debtor hereinabove provided, to be transferred and held by said Board of Directors as provided in paragraph 6G of said plan of reorganization.

Issuance and Transfer Taxes and Securities Act Exemption.

24. That the provisions of subdivisions 1, 2, and 3 of Schedule A of Title III of the Revenue Act of 1926, as amended by Sections 721, 722, and 723 of the Revenue Act of 1932, and the provisions of Sections 724 and 725 of the Revenue Act of 1932 shall not apply to the issuance, transfers, or exchanges of securities or obligations or the making or delivery of conveyances to make effective said plan of reorganization confirmed by this order. That each and all of the issuances, transfers, exchanges, surrenders, cancellations, conveyances, reconveyances, and discharges provided or contemplated by said plan of reorganization are hereby determined to be necessary and made to make said plan of reorganization effective.

25. All securities issued or to be issued pursuant to said plan of reorganization hereby confirmed shall be exempt from all of the provisions of the Securities Act of 1933, approved May 27, 1933, as amended, except the provisions of subdivision (2) of Section 12 and Section 17 thereof and except the provisions of Section 24 thereof as applied to any wilful violation of said Section 17. All securities issued by the debtor provided by said plan of reorganization shall be exempt securities within the meaning of this Section, and all such securities shall be and hereby are determined to be exempt securities. All receipts or counter-receipts issued by the debtor, trustee, or their agents for the purpose of carrying out and making said plan of reorganization effective, shall likewise be exempt securities as herein defined, and the debtor, trustee, and their agents are hereby author- [215] ized and directed to issue any and all receipts or counter-receipts necessary or proper to carry out and make effective said plan of reorganization.

Trustee to Continue in Possession.

26. The order of this court dated April 19, 1935, making permanent the appointment of W. R. Bassick as trustee, and permanently continuing said trustee in possession of the assets, property, business, and estate of the debtor is hereby confirmed and approved and extended until the final determination and termination of the proceedings herein, and until the entry of the final order herein said trustee shall continue in possession of the assets,

property, business, and estate of the debtor in all respects as provided in and by said order dated April 19, 1935, and shall have and exercise all the rights and powers and duties granted and conferred upon said trustee in and by said order. Said trustee is hereby authorized from time to time to apply to this court for such other and further orders and directions as the trustee may from time to time deem necessary or advisable in the conduct of the business and affairs of the debtor or in respect to the title to its assets, property, business, and estate and the possession thereof or otherwise in connection with the debtor's business or affairs or the proceedings herein taken.

Injunctions.

27. That all claims and demands against the debtor of whatever kind or nature, arising prior to May 17, 1932, excepting only such claims as are hereinabove expressly reserved to the United States of America, are hereby barred and enjoined, and no such claims so barred and enjoined shall be enforced against the debtor and/or the trustee or against assets in the hands of the debtor and/or its trustee or any of the property of the debtor, nor shall the holders of any such claims be entitled to any claim against any property or assets of the debtor other than as set forth in said plan of reorganization hereby confirmed. The holders of all such claims and all persons claiming by or through them or any of them are hereby severally and respectively

perpetually enjoined from prosecuting against said trustee and/or the debtor and/or any subsequent grantee, assignee, or transferee of either or both of them or against any property now owned or hereafter acquired by either or both of them, any claim, demand, suit, or proceeding arising out of or based upon any such claim or demand against, or liability of, the debtor, or otherwise, when seeking to impose liability upon the trustee and/or the debtor [216] and/or upon any grantee, assignee, or transferee of the debtor or upon any person or persons, corporation or corporations claiming by, under, or through either or both of them in respect of any claim, except pursuant to the provisions of, and in subordination to, this order. All property dealt with by said plan of reorganization and this order shall be free and clear of all claims of the debtor, its stockholders and creditors except pursuant to the provisions of and in subordination to this order.

Notice of Determination Herein Made.

28. That a copy of this order, which need not be certified, excluding "Exhibit A" (plan of reorganization, a copy of which has already been mailed to all creditors and stockholders, as aforesaid), be mailed by said trustee to each of the creditors and stockholders of the debtor affected by said plan of reorganization at their last known addresses within fifteen (15) days from the date hereof. Such mailing of a copy of this order shall constitute due notice to all creditors and stockholders of the debtor

affected by said plan of reorganization of all determinations herein made, particularly of the order of this court requiring the surrender of all stock of the debtor and all written obligations and security of the debtor affected by this plan, as hereinabove provided, and no other notice thereof or in connection therewith need be given.

Reservation of Jurisdiction.

29. That all matters not determined by this order are reserved by this court for future determination. That the life of this order shall be for and during such term as may be necessary to fully consummate the provisions of the aforesaid plan of reorganization. That this court further reserves the right and retains exclusive power and jurisdiction, by appropriate order or orders hereafter entered, to provide for and carry out said plan of reorganization under and subject to the supervision and control of this court, and hereby retains and shall have exclusive jurisdiction of the debtor and its property, wherever located, and shall have and may exercise all powers granted to it by law. That the trustee and debtor may from time to time apply to this court for such other order or orders as may be necessary to carry out and make effective this order confirming said plan of reorganization and the term of this court is hereby extended until the complete execution of the provisions of this order and until the entry of a final decree in the above entitled cause directing the trustee to transfer and convey the property dealt

with by said plan of reorganization to the [217] debtor, discharging said trustee, and closing the above entitled proceeding.

Dated: March 24, 1936.

A. F. ST. SURE

Judge of the United States
District Court.

The foregoing order confirming plan of reorganization and directing reorganization of debtor corporation has been examined and, upon the hearing and examination had upon said plan of reorganization, and the facts presented, I recommend that the same be made.

Dated: February 19, 1936.

BURTON J. WYMAN,

Special Master. [218]

[Endorsed]: Filed Feb. 19, 1941. [219]

[Title of District Court and Cause—No. 25937-S.]
ORDER FIXING TIME FOR HEARING OF
PETITION; APPOINTING SPECIAL
MASTER; AND REFERRING PETITION
AND OTHER MATTERS TO SPECIAL
MASTER.

It appearing to this court that Hendy Realization Co. (formerly The Joshua Hendy Iron Works), et al., have filed herein [220] their petition for an Order aiding, enforcing, effectuating, and protect-

ing the adjudication, order, and decree of this court confirming plan of reorganization and directing reorganization of The Joshua Hendy Iron Works pursuant thereto, and preventing and enjoining the threatened interference with and defeat of said adjudication, order, and decree and the jurisdiction of this court; and

It further appearing that said petition and the matters therein involved refer to the Order of this court dated March 24, 1936, confirming the plan of reorganization and directing the reorganization of The Joshua Hendy Iron Works (now Hendy Realization Co.) pursuant thereto and the proceedings had herein in connection therewith; that said Order dated March 24, 1936, and said proceedings were given, made, and taken by this court in consideration, *inter alia*, of the certificates and reports to this court of the Honorable Burton J. Wyman, Special Master; and that accordingly it is to the advantage, benefit, and best interests of all interested persons that said petition and the matters therein involved be heard before and by said Honorable Burton J. Wyman, as Special Master, and that said Special Master report his findings thereon to this court, and that this is a proper case therefor;

Now therefore, it is ordered, adjudged, and decreed:

1. That the Honorable Burton J. Wyman, Referee in Bankruptcy in this court, be, and he is hereby, appointed Special Master herein with full and

complete powers to hear said petition and all other matters in connection therewith, and to determine any and all questions and matters therein involved and herein, and to make appropriate orders and to do all things necessary or proper with reference to said petition and such questions and matters, whether now or hereafter arising in connection with said petition and this proceeding and the speedy and equitable consummation thereof; and to make findings of fact and conclusions of law with [221] reference to any general or special issues hereby or hereafter referred to said Special Master; saving and excepting only those questions and matters by law expressly reserved for hearing and determination by this court or requiring a final hearing before this court.

2. That Wednesday, the 12th day of March, 1941, at the hour of 2:00 o'clock, P. M., at the courtroom of and before the Honorable Burton J. Wyman, Special Master herein, Room 609, 1095 Market Street, San Francisco, California, be and they are hereby appointed the day, time, and place for the hearing and consideration of said petition, at which time and place all persons interested therein may appear and show cause, if any they have, why said petition should not be granted.

And it is further ordered that the Honorable Burton J. Wyman, the Special Master herein, report his findings upon said petition to this court on or before March 22, 1941.

And it is further ordered that said petition, together with said report of the Special Master, come

on for hearing before this court on Monday, the 24th day of March, 1941, at the hour of 10:00 o'clock, A. M.

And it is further ordered that petitioners give notice of this Order and said hearings by delivering a copy of this Order, on or before March 5, 1941, to Byrne, Lamson & Jordan, attorneys for Harold M. F. Behneman and Gladys M. Shores, the respondents named in said petition; such form and manner of notice being hereby determined to be a reasonable notice.

Dated: March 3, 1941.

A. F. ST. SURE

Judge of the District Court

Receipt of a copy of the foregoing Order is hereby acknowledged this 3rd day of March, 1941.

BYRNE, LAMSON & JORDAN

Attorneys for Respondents

Harold M. F. Behneman
and Gladys M. Shores.

[Endorsed]: Filed Mar. 4, 1941. [222]

[Title of District Court and Cause—No. 25937-S.]

MOTION TO STAY PROCEEDINGS

To the Honorable A. F. St. Sure, one of the judges of the above entitled court:

Harold M. F. Behneman and Gladys M. Shores, herein referred to as "Respondents", hereby ap-

pear specially, for the purposes of this motion only, and move the Honorable, the above entitled court to stay all further proceedings herein as to them, and each of them, with reference to that certain order entitled "Order Fixing [223] Time for hearing of petition; appointing special master; and referring petition and other matters to special master" issued herein by Honorable A. F. St. Sure, one of the judges of the above entitled court, on March 3, 1941, until such time as the said court in the above entitled proceeding shall have acquired jurisdiction of the persons of said Harold M. F. Behneman and said Gladys M. Shores.

This motion is based upon the ground that this court has acquired no jurisdiction over the persons of said Harold M. F. Behneman and said Gladys M. Shores in this proceeding through the service upon them, or either of them, or any process, order to show cause, or other notice as required by law.

This motion will be based upon all of the records, papers and files herein.

Dated: March 5, 1941.

BRYNE, LAMSON & JORDAN
PAUL S. JORDAN

Attorneys for Harold M. F.
Behneman and Gladys M.
Shores, appearing herein specially.

Admission of service.

[Endorsed]: Filed Mar. 6, 1941. [224]

[Title of District Court and Cause—No. 25937-S.]
PETITION FOR ORDER RESTRAINING AND
STAYING PENDING ACTIONS

To the Honorable, the District Court of the United
States in and for the Northern District of
California, Southern Division: [225]

The petition of Hendy Realization Co. (formerly
The Joshua Hendy Iron Works), a corporation,
A. J. Mayman, C. B. Moores, E. H. Price, W. R.
Bassick, E. M. Hyland, and Morris Levit respect-
fully alleges and shows:

I

Petitioners incorporate herein as fully as though
herein set forth at length the allegations contained
in the "Petition for Order Aiding, Enforcing, ef-
fectuating, and Protecting the Adjudication, Order,
and Decree of the Above Entitled Court Confirm-
ing Plan of Reorganization and Directing Reor-
ganization of Debtor Pursuant Thereto, and Pre-
venting and Enjoining the Threatened Interference
With and Defeat of Said Adjudication, Order, and
Decree and the Jurisdiction of the Above Entitled
Court" on file in the above entitled proceedings.

II.

That at the time of the filing of said petition
an action was pending in the Superior Court of
the State of California in and for the City and
County of San Francisco, numbered therein
299573, entitled "Harold M. F. Behneman, plain-

tiff, vs. Hendy Realization Co., et al., defendants,” in which said action Messrs. Byrne, Lamson & Jordan of San Francisco, California, in said District, are the attorneys of record for the plaintiff; that at the time of the filing of said petition an action was pending in the Superior Court of the State of California in and for the City and County of San Francisco, numbered therein 299911, entitled “Gladys M. Shores, plaintiff, vs. Hendy Realization Co., et al., defendants,” in which said action Messrs. Byrne, Lamson, & Jordan of San Francisco, California, in said District, are the attorneys of record for the plaintiff; that on or about February 25, 1941, an action was instituted by Harold M. Behneman in the Superior Court of the State of California in and for the City and County of San Francisco, numbered therein 300741, entitled “In the Matter of the Voluntary [226] Winding Up and Dissolution of Hendy Realization Co., a corporation,” in which said action Messrs. Byrne, Lamson & Jordan of San Francisco, California, in said District, are the attorneys of record for Harold M. F. Behneman; and that said actions, and each of them, are still pending therein.

III.

That if said actions are allowed to proceed irreparable injury and damage will be done to your petitioners, and each of them; and that said actions constitute and are an unwarranted and improper attack and attempted infringement of the sole and exclusive jurisdiction of the above entitled court

and its Order dated March 24, 1936, as more fully set forth in said petition hereinabove referred to and incorporated herein, and constitute and are an unwarranted and improper attempt to prevent and interfere with, and an attack upon, the enforcement and effectuation of said Order and Decree, and to defeat said Order and Decree and its purposes and the rights and advantages adjudged and granted thereby. That if such actions are allowed to proceed Harold M. F. Behneman and Gladys M. Shores, and each of them, threaten to continue their attack upon, and their endeavor to prevent and nullify the enforcement and effectuation of, the Order of the above entitled court dated March 24, 1936; and that petitioners have no adequate remedy at law, and that such actions and attack upon the Order of the above entitled court dated March 24, 1936, are of such nature as to cause, unless stayed and restrained, great, immediate, and irreparable injury to petitioners and to defeat the terms and spirit of said Order and Decree of the above entitled court dated March 24, 1936.

IV.

That the determination of the effect of, and the enforcement and effectuation of, said Decree dated March 24, 1936, are within the sole and exclusive jurisdiction and the exclusive province of the above entitled court as more fully set forth in said petition, [227] and that this is a proper case for the above entitled court to issue its Order staying and restraining said actions pending the hearing upon

said petition; and that no previous application has been made to this or any other court for the stay herein asked.

Wherefore, petitioners pray that the above entitled court make its Order staying and restraining Harold M. F. Behneman and Gladys M. Shores, and their said attorneys, agents, and servants, and each of them, and all other persons, and said Superior Court of the State of California in and for the City and County of San Francisco, from proceeding or taking any further proceedings in said actions pending the further Order of the above entitled court; and for such other and further relief as may be meet and proper in the premises.

Respectfully submitted,

HENDY REALIZATION CO.

(formerly The Joshua Hendy
Iron Works), a corporation.

By C. B. MOORES,

Vice-President.

A. J. MAYMAN

C. B. MOORES

E. H. PRICE

W. R. BASSICK

E. M. HYLAND

MORRIS LEVIT

STANLEY PEDDER and KENNETH
FERGUSON

PILLSBURY, MADISON & SUTRO
LONG & LEVIT

Attorneys for Petitioners. [228]

State of California,

City and County of San Francisco—ss.

C. B. Moores, being first duly sworn, deposes and says:

That he is an officer, to-wit, the Vice-President of Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, one of the petitioners in the foregoing petition, and as such is authorized to make this verification on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to such matters therein stated on information or belief, and as to those matters he believes the same to be true.

C. B. MOORES.

(Verification.)

[Endorsed]: Filed Mar. 11, 1941. [229]

[Title of District Court and Cause—No. 25937-S.]

ORDER RESTRAINING AND STAYING
PENDING ACTIONS

Upon reading and filing the verified petition of Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, A. J. Mayman, C. B. Moores, E. H. Price, W. R. Bassick, [230] E. M. Hyland, and Morris Levit, and the other petitions, files, and all proceedings herein; and this

court being satisfied that this is a proper case therefor:

It Is Ordered, Adjudged, and Decreed that Harold M. F. Behneman and Gladys M. Shores and Messrs. Byrne, Lamson & Jordan, their attorneys, and their agents and servants, and each of them, and all other persons, and the Superior Court of the State of California in and for the City and County of San Francisco, be, and they hereby are, jointly and severally restrained and enjoined from proceeding or taking any further proceedings, pending the further Order of this court, in those certain actions and proceedings pending in the Superior Court of the State of California in and for the City and County of San Francisco entitled and numbered therein as follows:

1. That certain proceeding numbered therein 299573, entitled "Harold M. F. Behneman, plaintiff, vs. Hendy Realization Co., et al., defendants;"

2. That certain proceeding numbered therein 299911, entitled "Gladys M. Shores, plaintiff, vs. Hendy Realization Co., et al., defendants;" and

3. That certain proceeding numbered therein 300741, entitled "In the Matter of the Voluntary Winding Up and Dissolution of Hendy Realization Co., a corporation;" which said action is brought on the petition of Harold M. F. Behneman.

And It Is Further Ordered that said Harold M. F. Behneman and Gladys M. Shores, and each of them, show cause before the Hon. Burton J. Wyman, Special Master herein, Room 609, 1095 Market Street, San Francisco, California, on the 12th day of March, 1941, at the hour of two o'clock, P. M., of that day, or as soon thereafter as counsel can be heard, why this Order restraining and staying said pending actions should not remain in full force and effect until the final determination of the "Petition for Order Aiding, Enforcing, Effectuating, and Protecting the Adjudication, Order, and Decree of the Above Entitled Court Confirming Plan of Reorganization and Directing Reorganization of Debtor Pursuant [231] Thereto, and Preventing and Enjoining the Threatened Interference With and Defeat of Said Adjudication, Order, and Decree and the Jurisdiction of the Above Entitled Court" on file herein, if any such cause they have.

And It Is Further Ordered that notice of this Order and of said hearing be given by delivering a copy of this Order, together with a copy of the petition therefor, to Messrs. Byrne, Lamson & Jordan, the attorneys of record for Harold M. F. Behneman and Gladys M. Shores in said actions on or before March 11, 1941; the time for service being hereby thus shortened, and such form and manner of notice being hereby determined to be a reasonable notice.

Dated: March 11, 1941.

A. F. ST. SURE,

Judge of the District Court.

The foregoing Order Restraining and Staying Pending Actions, together with the petition therefor, and the petitions, files, and proceedings in the above entitled matter, have been examined by me, and upon the facts presented I recommend that the same be made.

Dated: March 11, 1941.

BURTON J. WYMAN,
Special Master.

[Endorsed]: Filed Mar 11 1941. [232]

[Title of District Court and Cause—No. 25937-S.]

CERTIFICATE AND REPORT OF SPECIAL MASTER PERTAINING TO ALL MATTERS GROWING OUT OF PETITION FOR ORDER AIDING, ENFORCING, EFFECTUATING, AND PROTECTING THE ADJUDICATION, ORDER, AND DECREE OF THE ABOVE ENTITLED COURT CONFIRMING PLAN OF REORGANIZATION AND DIRECTING REORGANIZATION OF DEBTOR PURSUANT THERETO, AND PREVENTING AND ENJOINING THE THREATENED INTERFERENCE WITH AND DEFEAT OF SAID ADJUDICATION, ORDER AND DECREE AND THE JURISDICTION OF THE ABOVE ENTITLED COURT.

To Honorable A. F. St. Sure, United States District Judge for the Northern District of California: [233]

I, Burton J. Wyman, one of the referees in bankruptcy of this court, to whom, as special master, have been referred certain phases of the proceedings herein, respectfully certify and report:

Because I believe it will lessen the labor of the court in dealing with this certificate and report, as well as with the subject matter thereof, I shall present in chronological order, the proceedings under discussion.

On February 19, 1941, there was filed in this court on behalf of Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, A. J. Mayman, C. B. Moores, E. H. Price, W. R. Bassick, E. M. Hyland, and Morris Levit, as petitioners, the following verified petition:

“Your petitioners herein respectfully allege and show:

“I.

“That your petitioner Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, is, and at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of California, and with its principal office and place of business within said State in the City and County of San Francisco, and within the territorial jurisdiction of the above entitled court, to-wit, in the Southern Division of the Northern District of California; that at all times herein mentioned, and until December 2, 1940, the name of petitioner corporation was

The Joshua Hendy Iron Works, but that on December 2, 1940, pursuant to corporate proceedings duly had for such purpose the articles of incorporation of said corporation were duly amended so as to change the name of petitioner corporation to Hendy Realization Co.; and that petitioners A. J. Mayman, C. B. Moores, [234] E. H. Price, and W. R. Bassick are the duly appointed, qualified, and acting Directors of petitioner Hendy Realization Co. (hereinafter referred to as 'Petitioner corporation').

“II.

“That on March 4, 1935, the above entitled proceedings were filed and instituted by creditors of petitioner corporation for the reorganization of petitioner corporation as a debtor pursuant to the provisions of Sections 77A and 77B of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto, hereinafter more generally referred to as the 'Bankruptcy Act.'

“III.

“That pursuant and subsequent thereto such proceedings were duly and regularly taken and had that a plan for the reorganization of petitioner corporation as debtor was duly presented, heard, and reported upon by the Hon. Burton J. Wyman, Special Master, and the

above entitled court duly gave and made its Order dated March 24, 1936, confirming said plan of reorganization and directing the reorganization of your petitioner corporation, as debtor, pursuant thereto; that a true copy of said Order confirming said plan of reorganization and directing the reorganization of petitioner corporation is attached to this petition, marked 'Exhibit A,' and incorporated herein by reference, and that special reference is hereby made thereto for a full statement of the acts and proceedings taken and had prior thereto in the above entitled proceedings.

"IV.

"That said Order dated March 24, 1936, is still in full force and effect and expressly incorporates by reference [235] the plan of reorganization thereby confirmed, and, by said incorporation, provides and directs, inter alia:

" 'G. Capital stock.

4425 shares of the capital stock of the debtor corporation are now outstanding, said shares having a book value of \$212,898.51, but no actual value.

In consideration of the extensions granted by the creditors and of the reduction of their claims in the sum of \$73,853.06, as aforesaid, the stockholders shall appropriately endorse and deliver the stock held by them to the Board of Directors of the debtor corporation,

appointed as hereinafter provided, to be held by said Board as follows:

1. 50% of the shares so deposited by each stockholder shall be held in trust and voted by said Board for a period of 5 years, and thereafter until the extended obligations are fully paid, so as to leave the management of the debtor corporation during such period in the hands of its creditors. The Board shall have full power to vote said stock, including the power to vote for a reorganization of the capital structure of the debtor corporation so as to provide, at any time, for an issue of one or more classes of preferred stock and the exchange therefor of any part or all of the unsecured liabilities of the debtor corporation. Upon the expiration of 5 years and the payment in full of the extended obligations, such shares shall be returned to their respective owners.
2. The remaining 50% of the shares so delivered by each stockholder shall be held by said Board free and clear of any claim, right, title, or interest therein by such stockholder to be distributed by said Board, in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for manage-

ment and the successful rehabilitation of the company's affairs.'

"V.

"That pursuant to said terms of said Order dated March 24, 1936, petitioner corporation's stockholders thereafter endorsed and delivered the outstanding stock held by them to petitioner corporation's Board of Directors to be held by said Board of Directors pursuant to said terms of said plan of reorganization and Order confirming the [236] same; and that thereupon said Board of Directors as Voting Trustees issued their Voting Trust Certificates to each of said stockholders for 50% of the shares so deposited by such stockholders, and retained the remaining 50% of the shares so delivered by each stockholder, aggregating 2212½ shares, pursuant to said plan and Order, free and clear of any claim, right, title, or interest therein by such stockholders.

"VI.

"That said stock so surrendered by said stockholders had, as found by said Order, no actual value at said time; but that subsequent to said date the officers and management of petitioner corporation have so managed the affairs and business of petitioner corporation that they have become, and were on December 20, 1940, rehabilitated, sound, businesslike, and satisfactory in condition, and improved from

the point where the stockholders of petitioner corporation had no equity, as aforesaid, to a point where the equity of petitioner corporation's stockholders has, and had upon December 20, 1940, become very substantial. That such successful management of petitioner corporation's affairs has been had pursuant to arrangements made with petitioner corporation's managing officers immediately upon the giving and making of said Order dated March 24, 1936; that, notwithstanding the value of such services to petitioner corporation, the compensation of said managing officers was, by reason of such arrangements, not commensurate therewith; and that by said arrangement, and at divers intervening times, petitioner corporation represented to said managing officers that such compensation so received by them would be supplemented by the distribution of, and that as a reward and partial compensation for their management and successful rehabilitation of petitioner corporation's affairs [237] petitioner corporation's Board of Directors, as aforesaid, would distribute, said capital stock of petitioner corporation so held by petitioner corporation's Board of Directors for said purpose pursuant to the terms of said Order dated March 24, 1936. That petitioners, and each of them, were fully advised of the terms of said Order dated March 24, 1936, and from and after said date acted in the light thereof and in

reliance thereon; and that all of petitioner corporation's creditors and stockholders, including respondents, and each of them, have acquiesced in and have accepted benefits and advantages provided to them by said Order and the actions and proceedings taken and had by petitioner corporation and its Board of Directors pursuant thereto.

“VII.

“That accordingly, and on December 20, 1940, pursuant to the order, authority, and direction of said Order dated March 24, 1936, as aforesaid, petitioner corporation's Board of Directors, in special meeting duly assembled, and in the exercise of the sole discretion invested in it by said Order, unanimously adopted the following resolution, Director W. R. Bassick, however, expressly not participating in said vote:

“ ‘Whereas, under the terms of the confirmed plan of reorganization of this corporation and the Voting Trust created pursuant thereto, 2212½ shares of the capital stock of this corporation are now held by this Board, as Voting Trustees, free and clear of any claim, right, title, or interest therein by the former stockholders surrendering the same, and subject to the distribution by this Board, in its sole discretion, either in whole or in part to the managing officers of this corporation as a reward for their management and the successful rehabilitation of the corporation's affairs; and

“ ‘Whereas, the officers of this corporation hereinafter named have, since its reorganization, rendered extremely valuable services to, and in the management of, the corporation, resulting in its rehabilitation as a sound and going business, and the improvement of the financial condition of the corpora- [238] tion from a point where the stockholders of the corporation had no equity, as evidenced by the records of the reorganization of the corporation under Section 77B of the Bankruptcy Act, to a point where the equity of the stockholders has become very substantial; and

“ ‘Whereas, the financial position, business, and affairs of this corporation have, since its reorganization, evidenced steady and substantial improvement to the point that they have become rehabilitated, sound, business-like, and satisfactory in condition, and such rehabilitation of the corporation’s business so occasioned has made possible the advantageous sale of the Sunnyvale plant and properties of the corporation just consummated; and

“ ‘Whereas, notwithstanding the value of such services to this corporation, the compensation of such officers has not been commensurate therewith, and this Board through its Directors, has repeatedly represented to such officers that the compensation received by

them during said period would be supplemented by additional reward as soon as in the opinion of the Board such further reward was practical and expedient; and

“ ‘Whereas, in addition, due to the sale of the corporation’s Sunnyvale plant and properties, the employment of certain of said officers has necessarily been severed, and their vacation and other rights interfered with; and

“ ‘Whereas, it appears just and proper that said 2212½ shares of the capital stock of this corporation held by this Board, as aforesaid, be issued to said managing officers, subject to the condition hereinafter set forth, as a reward for their successful management and rehabilitation of the corporation’s affairs; and it appears to be for the best interests of this corporation that the following resolution be adopted;

“ ‘Now Therefore, Be It Resolved, that this Board forthwith distribute said 2212½ shares of the capital stock of this corporation so held by it to the following persons in the respective amounts hereinafter set forth, in recognition, appreciation, payment, and reward for their exemplary and valuable services to this corporation and as a reward for their management and the successful rehabilitation of the corporation’s affairs:

W. R. Bassick 812½ shares
E. M. Hyland 700 shares
M. Levit 700 shares;

provided, however, that each such person shall, prior to, and as a condition precedent to, receiving such distribution of stock, waive in writing the right of such person to receive any dividends or distribution upon said stock out of the first \$85,848.75 available for dividends or distribution upon the capital stock of this corporation, in dissolution or otherwise, so that the said sum of \$85,848.75 may be prorated and [239] paid by way of dividend, distribution, or otherwise (or set aside for such payment), only to the holders of the remaining 1907¾ shares of the outstanding stock of the corporation now held by this Board as Voting Trustees, to the end that said persons holding said 2212½ shares hereby distributed shall only participate in dividends or distributions upon the capital stock of this corporation made in excess of said sum of \$85,848.75, as aforesaid.

“ ‘And Be It Further Resolved, that the President or Vice-President and the Secretary or Assistant Secretary of this corporation be and they are hereby authorized and directed, for and on behalf of this Board, to take all such steps and to execute all such documents as may be necessary or desirable

to effectuate the distribution, transfer, and delivery of said stock to said officers, as aforesaid, and to fully effectuate the purposes of this resolution.'

“VIII.

“That pursuant thereto, and to the terms of said order dated March 24, 1936, said 2212½ shares of the capital stock of petitioner corporation, so held by the Board of Directors, were duly distributed to petitioner corporation's said managing officers as a reward for their management and said successful rehabilitation of petitioner corporation's affairs; 812½ of said shares being distributed to W. R. Bassick, petitioner's President, 700 shares thereof being distributed to E. M. Hyland, petitioner's Vice-President (in charge) of Manufacturing, and 700 shares thereof being issued to M. Levit, petitioner's Vice-President (in charge) of Sales, upon the terms and after the execution in writing by each of them of the waivers provided in said resolution. That said shares were so distributed to petitioner corporation's said managing officers by petitioner corporation's Board of Directors, in the exercise of its sole discretion as a reward and partial compensation for their management of petitioner corporation's affairs so that they had become, and petitioners A. J. Mayman, C. B. Moores, E. H. Price, and W. R. Bassick, and A. E. Webber

(now deceased), as petitioner corporation's said Board of Directors, in the exercise of their [240] sole discretion found them to be, successfully rehabilitated, sound, businesslike, and satisfactory in condition; and were so distributed in express compliance with, and exercise and enforcement of, the order, authority, and direction of said Order dated March 24, 1936, and not otherwise; and that by so distributing said stock to said managing officers petitioner corporation's Board of Directors was enforcing and effectuating the authority and direction of said Order confirming plan of reorganization and securing and preserving the fruits and advantages thereof and carrying the same into effect.

“IX.

“That notwithstanding the terms and provisions of said Order dated March 24, 1936, and said action by petitioner corporation's Board of Directors pursuant thereto and in the enforcement thereof, and on or about January 6, 1941, respondent Harold M. F. Behneman, one of petitioner corporation's stockholders, instituted an action in the Superior Court of the State of California in and for the City and County of San Francisco, entitled ‘Harold M. F. Behneman, plaintiff, vs. Hendy Realization Co., et al., defendants,’ and numbered therein 299573, and on or about January 17, 1941, respondent Gladys M. Shores instituted

an action in the Superior Court of the State of California in and for the City and County of San Francisco, entitled 'Gladys M. Shores, plaintiff, vs. Hendy Realization Co., et al., defendants,' and numbered therein 299911, wherein and whereby said respondents, in each of said actions, seek to have it declared by said Superior Court of the State of California in and for the City and County of San Francisco: that the distribution of said 2212½ shares to petitioners W. R. Bassick, E. M. Hyland, and Morris Levit, petitioner corporation's said managing [241] officers, in compliance with said Order dated March 24, 1936, as aforesaid, was illegal and void; that said managing officers, and each of them, be ordered to surrender said 2212½ shares back to petitioner corporation, and that said shares be cancelled and retired; that petitioner corporation's Directors be required to account for said 2212½ shares of stock so distributed, as aforesaid, together with all dividends thereon; and that petitioner corporation and its petitioning Directors be permanently restrained and enjoined from declaring or paying any liquidating or other dividends or payments from petitioner corporation's assets to petitioner stockholders holding said 2212½ shares so distributed. And that in and by said actions said respondents moreover seek to have the Superior Court of the State of California in and for the City and

County of San Francisco construe and interpret the terms and provisions of said Order of the above entitled court dated March 24, 1936, as hereinabove set forth, particularly with reference to the distribution of said stock as aforesaid, and seek to have said State Superior Court declare and determine the rights and duties of the parties thereunder and the nature, extent, and effect of said Order of the above entitled court dated March 24, 1936.

“X.

“That the jurisdiction of the above entitled court in the premises, and in the subject matter of the above entitled proceedings, and in the interpretation, construction, effectuation, and enforcement of its said Order dated March 24, 1936, is sole and exclusive; and that said actions instituted by said respondents in the Superior Court of the State of California in and for the City and [242] County of San Francisco, and each of them, constitute and are an unwarranted and improper attack and attempted infringement of said sole and exclusive jurisdiction of the above entitled court and its said Order, and constitute and are an unwarranted and improper attempt to prevent and interfere with the enforcement and effectuation of said Order and Decree and to defeat said Order and Decree and its purposes and the rights and advantages adjudged and granted thereby. That

said respondents, and each of them, threaten to continue and prosecute said actions unless restrained and enjoined there-against, and that, unless restrained and enjoined from so doing by this court, respondents, and each of them, will proceed with the prosecution of said actions and the taking of other actions designed to interfere with and defeat the terms, purpose, and enforcement of said Order dated March 24, 1936, and will seek to prevent and nullify the enforcement and effectuation thereof. That petitioners have no adequate remedy at law and that such actions and attach upon the Order of the above entitled court dated March 24, 1936, are of such nature as to cause, unless restrained, great immediate and irreparable injury to petitioners, and to defeat the terms and spirit of said decree dated March 24, 1936.

“XI.

“That the determination of the effect of, and the enforcement and effectuation of, said decree dated March 24, 1936, is within the sole and exclusive jurisdiction and the exclusive province of the above entitled court, and that this is a proper case for the above entitled court to issue its injunction enjoining the continuance of said actions by respondents in the Superior Court of the State of California in and for the City and County [243] of San Francisco, in aid of and to enforce and effectu-

ate its own said decree dated March 24, 1936, and to secure and preserve the fruits and advantages thereof and to prevent the same from being defeated.

“Wherefore, petitioner prays:

“1. That an order be made and entered permanently staying, restraining, and enjoining respondents Harold M. F. Behneman and Gladys M. Shores, and each of them, and their heirs, representatives, and assigns, from further proceeding with their said actions now pending in the Superior Court of the State of California in and for the City and County of San Francisco, and/or from taking or doing any and all acts, and/or from the commencement or continuation of any and all proceedings, interfering with or attacking said Order of this court dated March 24, 1936, or the enforcement thereof, and/or said distribution of said 2212½ shares of the capital stock of petitioner corporation pursuant thereto, and/or the rights of petitioner distributees of said stock therein;

“2. That such further order be made and entered as may be necessary to fully effectuate and enforce said Order dated March 24, 1936, and said distribution of stock pursuant thereto, and to protect and enforce the sole and exclusive jurisdiction of the above entitled court manifested thereby and in the premises; and

“3. That petitioners have such other and further relief as may be meet and proper in the premises.

“Respectfully submitted,

“HENDY REALIZATION CO.
(formerly The Joshua Hendy
Iron Works), a corporation

“By C. B. MOORES
Vice-President

“C. B. MOORES [244]

“A. J. MAYMAN

“E. H. PRICE

“W. R. BASSICK

“E. M. HYLAND

“MORRIS LEVIT

“Petitioners.

“STANLEY PEDDER & KENNETH
FERGUSON

“PILLSBURY, MADISON & SUTRO

“LONG & LEVIT

“Attorneys for Petitioners.”

(Verification and “Exhibit A” omitted for
sake of brevity.)

(See original of said petition, with said “Exhibit A” attached, on file in the office of the Clerk of this court.)

Thereafter, and on March 3, 1941, this court issued its order fixing time for hearing on said peti-

tion, appointing special master, and referring said petition and other matters to special master, it being further provided in said order "that petitioners give notice of this Order and said hearings by delivering a copy of this Order, on or before March 5, 1941, to Byrne, Lamson & Jordan, attorneys for Harold M. F. Behneman and Gladys M. Shores, the respondents named in said petition; such from and manner of notice being hereby determined to be a reasonable notice."

The aforesaid order, after "Byrne, Lamson & Jordan, Attorneys for Respondents Harold M. F. Behneman and Gladys M. Shores," had given their receipt therefor, as shown at the bottom of said order, was filed in the court on March 4, 1941.

Subsequently, and on March 6, 1941, there was filed on behalf of said respondents, a written motion to stay proceedings, accompanied by a notice thereof, said motion reading: [245]

"To the Honorable A. F. St. Sure, one of the judges of the above entitled court:

"Harold M. F. Behneman and Gladys M. Shores, herein referred to as 'Respondents', hereby appear specially, for the purpose of this motion only, and move the Honorable, the above entitled court to stay all further proceedings herein as to them, and each of them, with reference to that certain order entitled 'Order Fixing Time for Hearing of Petition; Appointing Special Master; and Referring Petition and Other Matters to Special

Master' issued herein by Honorable A. F. St. Sure, one of the judges of the above entitled court, on March 3, 1941 until such time as the said court in the above entitled proceeding shall have acquired jurisdiction of the persons of said Harold M. F. Behneman and said Gladys M. Shores.

"This motion is based upon the ground that this court has acquired no jurisdiction over the persons of said Harold M. F. Behneman and said Gladys M. Shores in this proceeding through the service upon them, or either of them, of any process, order to show cause, or other notice as required by law.

"This motion will be based upon all of the records, papers and files herein.

"Dated: March 5, 1941.

"BYRNE, LAMSON &
JORDAN

"PAUL S. JORDAN,

"Attorneys for Harold M.
F. Behneman and Gladys
M. Shores, appearing herein
specially."

(See said motion, notice of motion, and order referring said motion to special master, all among the records in the office of the Clerk of this Court.)

[246]

On March 11, 1941, there was filed in the above entitled proceeding, the following verified petition for order restraining and staying pending actions:

“The petition of Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, A. J. Mayman, C. B. Moores, E. H. Price, W. R. Bassick, E. N. Hyland, and Morris Levit respectfully alleges and shows:

“I

“Petitioners incorporate herein as fully as though herein set forth at length the allegations contained in the ‘Petition for Order Aiding, Enforcing, Effectuating, and Protecting the Adjudication, Order, and Decree of the Above Entitled Court Confirming Plan of Reorganization and Directing Reorganization of Debtor Pursuant Thereto, and Preventing and Enjoining the Threatened Interference with and defeat of Said Adjudication, Order, and Decree and the Jurisdiction of the Above Entitled Court’ on file in the above entitled proceedings.

“II.

“That at the time of the filing of said petition an action was pending in the Superior Court of the State of California in and for the City and County of San Francisco, numbered therein 299573, entitled ‘Harold M. F. Behneman, plaintiff, vs. Hendy Realization Co., et al., defendants,’ in which said action Messrs. Byrne, Lamson & Jordan of San Francisco, California, in said District, are the attorneys of record for the plaintiff; that at the time of the filing of said petition an action

was pending in the Superior Court of the State of California in and for the City and County of San Francisco, numbered therein 299911, entitled 'Gladys M. Shores, plaintiff, vs. Hendy Realization Co., et al., defendants,' in which said action Messrs. Byrne, Lamson, [247] & Jordan of San Francisco, California, in said District, are the attorneys of record for the plaintiff; that on or about February 25, 1941, an action was instituted by Harold M. Behneman in the Superior Court of the State of California in and for the City and County of San Francisco, numbered therein 300741, entitled 'In the Matter of the Voluntary Winding Up and Dissolution of Hendy Realization Co., a corporation,' in which said action Messrs. Byrne, Lamson & Jordan of San Francisco, California, in said District, are the attorneys of record for Harold M. F. Behneman; and that said actions, and each of them, are still pending therein.

"III.

"That if said actions are allowed to proceed irreparable injury and damage will be done to your petitioners, and each of them; and that said actions constitute and are an unwarranted and improper attack and attempted infringement of the sole and exclusive jurisdiction of the above entitled court and its Order dated March 24, 1936, as more fully set forth in said petition hereinabove referred to and incor-

porated herein, and constitute and are an unwarranted and improper attempt to prevent and interfere with, and an attack upon, the enforcement and effectuation of said Order and Decree, and to defeat said Order and Decree and its purposes and the rights and advantages adjudged and granted thereby. That if such actions are allowed to proceed Harold M. F. Behneman and Gladys M. Shores, and each of them, threaten to continue their attack upon, and their endeavor to prevent and nullify the enforcement and effectuation of, the Order of the above entitled court dated March 24, 1936; and that petitioners have no adequate remedy at law, and that such [248] actions and attack upon the Order of the above entitled court dated March 24, 1936, are of such nature as to cause, unless stayed and restrained, great, immediate, and irreparable injury to petitioners and to defeat the terms and spirit of said Order and Decree of the above entitled court, dated March 24, 1936.

“IV.

“That the determination of the effect of, and the enforcement and effectuation of, said Decree dated March 24, 1936, are within the sole and exclusive jurisdiction and the exclusive province of the above entitled court as more fully set forth in said petition, and that this is a proper case for the above entitled court

to issue its Order staying and restraining said actions pending the hearing upon said petition; and that no previous application has been made to this or any other court for the stay herein asked.

“Wherefore, petitioners pray that the above entitled court make its Order staying and restraining Harold M. F. Behneman and Gladys M. Shores, and their said attorneys, agents, and servants, and each of them, and all other persons, and said Superior Court of the State of California in and for the City and County of San Francisco, from proceeding or taking any further proceedings in said actions pending the further Order of the above entitled court; and for such other and further relief as may be meet and proper in the premises.

“Respectfully submitted,

“HENDY REALIZATION CO.

(formerly The Joshua Hendy
Iron Works), a corporation.

“By C. B. MOORES,

Vice-President [249]

“A. J. MAYMAN

“C. B. MOORES

“E. H. PRICE

“W. R. BASSICK

“E. H. HYLAND

“MORRIS LEVIT

“STANLEY PEDDER & KENNETH
FERGUSON

“PILLSBURY, MADISON & SUTRO

“LONG & LEVIT

“Attorneys for Petitioners.”

(Verification omitted for sake of brevity.)

(See original of said last mentioned petition on file in the office of the Clerk of this Court.)

Thereafter, and on said March 11, 1941, the court issued the following order:

“Upon reading and filing the verified petition of Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, A. J. Mayman, C. B. Moores, E. H. Price, W. R. Bassick, E. M. Hyland, and Morris Levit, and the other petitions, files, and all proceedings herein; and this court being satisfied that this is a proper case therefor:

“It is Ordered, Adjudged, and Decreed that Harold M. F. Behneman and Gladys H. Shores and Messrs. Byrne, Lamson & Jordan, their attorneys, and their agents and servants, and each of them, and all other persons, and [250] the Superior Court of the State of California in and for the City and County of San Francisco, be, and they hereby are, jointly and severally restrained and enjoined from proceeding or taking any further proceedings, pending the further Order of this Court, in those certain actions and proceedings pending in the Su-

perior Court of the State of California in and for the City and County of San Francisco entitled and numbered therein as follows:

“1. That certain proceeding numbered therein 299573, entitled ‘Harold M. F. Behneman, plaintiff, vs. Hendy Realization Co., et. al., defendants;’

“2. That certain proceeding numbered therein 299911, entitled ‘Gladys M. Shores, plaintiff, vs. Hendy Realization Co., et. al., defendants;’ and

“3. That certain proceeding numbered therein 300741, entitled ‘In the Matter of the Voluntary Winding Up and Dissolution of Hendy Realization Co., a corporation;’ which said action is brought on the petition of Harold M. F. Behneman.

“And It Is Further Ordered that said Harold M. F. Behneman and Gladys M. Shores, and each of them, show cause before the Hon. Burton J. Wyman, Special Master herein, Room 609, 1095 Market Street, San Francisco, California, on the 12th day of March, 1941, at the hour of two o’clock, P. M., of that day, or as soon thereafter as counsel can be heard, why this Order restraining and staying said pending actions should not remain in full force and effect until the final determination of the ‘Petition for Order Aiding, Enforcing, effectuating, and Protecting the Adjudication, Order, and Decree of the Above Entitled Court Confirm-

ing Plan of Reorganization and Directing Reorganization of Debtor Pursuant Thereto, and Preventing and Enjoining the Threatened Interference With and Defeat of Said Adjudication, Order, and Decree and the Jurisdiction of the Above Entitled Court' on file herein, if any [251] such cause they have.

“And It Is Further Ordered that notice of this Order and of said hearing be given by delivering a copy of this Order, together with a copy of the petition therefor, to Messrs. Byrne, Lamson & Jordan, the attorneys of record for Harold M. F. Behneman and Gladys M. Shores in said actions on or before March 11, 1941; the time for service being hereby thus shortened, and such form and manner of notice being hereby determined to be a reasonable notice.

“Dated: March 11, 1941.

“A. F. ST. SURE,

“Judge of the District Court.

(Recommendation of special master omitted for sake of brevity.)

(See original of said last referred-to order on file in the office of the Clerk of this Court.)

The filing of said last mentioned order was followed, on March 17, 1941, by a motion to dismiss petitions and to vacate and dissolve temporary injunctions, said referred-to motion reading:

“Harold M. F. Behneman and Gladys M. Shores, herein referred to as Respondents, reserving all objections to the jurisdiction of the above entitled court over their persons, as set forth in their joint Motion to Stay Proceedings filed herein on March 6, 1941, hereby move the Honorable, the above entitled court, for an order dismissing the petition heretofore filed in the above captioned proceedings on February 19, 1941, entitled ‘Petition for Order Aiding, Enforcing, Effectuating and Protecting the Adjudication, Order and Decree of the Above Entitled Court Confirming Plan of Reorganization and Directing Reorganization [252] of Debtor Pursuant Thereto, and Preventing and Enjoining the Threatened Interference With and Defeat of Said Adjudication, Order and Decree and the Judisdiction of the Above Entitled Court,’ and for an order dismissing the petition filed in the above captioned proceedings, on March 11, 1941, entitled ‘Petition for Order Restraining and Staying Pending Actions,’ and for an order dissolving and vacating the order of the above entitled court, duly made and entered herein on March 11, 1941, entitled ‘Order Restraining and Staying Pending Actions.’

“This motion will be made upon the ground that the above entitled court lacks jurisdiction in this proceeding over the issues raised by, and

the subject matter referred to and described in, said above mentioned petitions filed herein on February 19, 1941 and on March 11, 1941, or to grant the relief prayed for in said petitions, or either of said petitions, and upon the further ground that neither of said petitions states a claim against Harold M. F. Behneman and Gladys M. Shores, or either of them, upon which relief can be granted.

“This motion will be based upon documentary evidence to be introduced at the time of the hearing on this motion, and upon all of the records, papers and files herein.

“Dated: March 17th, 1941.

“BYRNE, LAMSON & JORDAN

“PAUL S. JORDAN

“Attorneys for Harold M. F.
Behneman and Gladys M.
Shores, herein referred to as
Respondents.”

(Notice of Motion attached to said last mentioned motion omitted for sake of brevity.)

(See original of said last referred-to motion which is handed up herewith as a part of this certificate and report.) [253]

Other Matters Shown by the Record Herein

On October 22, 1935, there was filed herein the following acceptance of plan of reorganization:

“United States of America,
“District of Puerto Rico—ss.

“The undersigned, being duly sworn, deposes and says:

“That affiant hereby accepts the plan for the reorganization of The Joshua Hendy Iron Works, debtor corporation, pursuant to Section 77B of the Bankruptcy Act, filed in the above entitled proceeding on September 25, 1935, and duly noticed to be considered and heard before the Honorable W. A. Beasly, Special Master, on October 16, 1935.

G. M. S.

“Affiant is the owner of 607 shares of the capital stock of the debtor corporation, which the undersigned acquired without reference to
July 1, 1934 G. M. S.

said plan prior to ~~May 17, 1932~~, and the interest of the undersigned will be affected by said plan.

“GLADYS M. SHORES

“Subscribed and sworn to before me this 11th day of October, 1935 at San Juan, Puerto Rico.

[Seal]

LULU G. DONOHUE

Clerk of Dist. Court U. S. for P. R.”

(See original thereof on file in the office of the Clerk of this Court.)

There also was filed on October 22, 1935, by Messrs. Byrne, Lamson & Jordan on behalf of Harold M. F. Behneman, the following objection:

“Comes now Harold M. F. Behneman, the largest stockholder of the debtor corporation, and objects to G-2 of [254] the re-organization plan heretofore submitted upon the grounds that the said plan contemplates the taking of stockholders’ property and giving it to others; that there is no authority for such disposition of stockholders’ property under 77-B of the National Bankruptcy Act; that if the provisions of said Bankruptcy Act do so provide, such action is contrary to the due process clause of the Constitution of the United States; and that said plan of so disposing of stockholders’ interests is inequitable and without consideration.

“Dated: October 21, 1935.

“BYRNE, LAMSON & JORDAN

“Attorneys for Stockholder Specified”

(See original thereof on file in the office of the Clerk of this Court.)

It also is respectfully suggested that the court take note of Certificate and Report of Special Master Relative to Confirmation of Plan of Reorganization and Directing Reorganization of Debtor Corporation filed herein on February 19, 1936, and also Brief of Harold M. F. Behneman on Objections to Plan of Reorganization, by Messrs. Byrne,

Lamson & Jordan, which was filed with the special master on January 6, 1936, (now on file with the Clerk of this Court), wherein on pages 5 and 6 the subject of "successful rehabilitation of the company's affairs" is discussed.

At the time of the hearing held before me I was attended upon by L. D. Byrne, Esq., and Paul S. Jordan, Esq., of the firm of Byrne, Lamson & Jordan, representing said respondents, and Kenneth Ferguson, Esq., one of the attorneys for the petitioners herein.

During said hearing, which, for the most part, was devoted to discussions of the law involved, there were offered in evidence the following documents: [255]

(1) Certified copy of Complaint for Declaratory Relief; For Injunctive Relief, and For Cancellation of Certain Stock Certificates, in state court action No. 299573, marked "Respondents' No. 1, 3/18/41, B.J.W., R.";

(2) Certified copy of Complaint for Declaratory Relief; For Injunctive Relief, and For Cancellation of Certain Stock Certificates, in state court action No. 299911, marked "Respondents' No. 2, 3/18/41, B.J.W., R.", and

(3) Certified copy of Shareholder's Petition for Court Supervision Over the Voluntary Winding up of Corporate Affairs, in state court action No. 300741, marked "Respondents' No. 3, 3/18/41, B.J.W., R."

DISCUSSION BY AND OPINION OF SPECIAL MASTER

The controversies before the court arise in a proceeding which was begun, and still is, under the provisions of Section 77B of the Bankruptcy Act. It therefore is necessary to look to this section for guidance in determining what course the court should pursue in dealing with the questions now involved.

In the first place, it is declared, in part, by subdivision (a) of said section, "Upon the filing of * * * a petition or answer the judge shall enter an order either approving it as properly filed under this section if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it. If the petition or answer is so approved, an order of adjudication in bankruptcy shall not be entered and the court in which such order approving the petition or answer is entered shall, during the pendency of the proceedings under this section, have exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section, and shall have and may exercise all the powers, not inconsistent with this section, which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its in- [256] ability to pay its debts as they mature."

Secondly, it is provided in subdivision (f) 7, "* * * Upon confirmation of the plan by the judge, the debtor and other corporation or corporations

organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to put into effect and carry out the plan and the orders of the judge relative thereto.”

And lastly, subdivision (o) of said section provides, “In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor’s petition or answer was approved.”

I. There is one proposition as to which I am absolutely certain, and that is that this court, inasmuch as “the duties of the debtor and the rights and liabilities of creditors, *and of all persons with respect to the debtor and its property,** shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor’s petition or answer was approved,” has the jurisdictional power to deal with the matters referred to in the two petitions now before the court for consideration.

See *Holmes v. Rowe*, (C.C.A. 9) 97 F. (2d) 537.

In other words, it is my unqualified opinion that no successful contention can be made that this court by entering the final decree in the debtor proceeding

*Italics in this opinion are by the Special Master.

here under consideration deprived itself of the right to defend said final decree, to say what it meant, or of the right to deny to any other court, except a Federal Appellate Court, the possibility of making a finding and decree which might put a different [257] interpretation upon said final decree of this court from what would be found and decreed in said last mentioned court. In the language of *In re Home Discount Co.*, 147 F. 552, "The law does not make * * * weaklings of courts of bankruptcy. They have ample power to protect the bankrupt in the enjoyment of all his rights, and to frustrate the efforts of those who seek to defeat the practical enjoyment of them."

II. It is next necessary to answer the question as to whether or not this court has jurisdiction over the respondents Behneman and Shores. In this connection I am of the unqualified opinion that the court has such jurisdiction:

(a) Because both of these respondents originally became participants in this debtor proceeding a long time ago, (see pages 320 to 323 hereof), and became bound by the order of confirmation. See subdivision (g) which reads, "Upon such confirmation the provisions of the plan and of the order of confirmation shall be binding upon (1) the debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) all creditors, secured or unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if

filed, whether or not approved, including creditors who have not, as well as those who have, accepted it," and also subdivision (h) which reads, "Upon final confirmation of the plan, the debtor and other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the judge, and the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the debtor or the other corporation or corporations provided for by the plan, or, if no trustee has been appointed, when retained by the debtor pursuant to the plan or transferred by it to the other [258] corporation or corporations provided for by the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the court may direct the trustee or trustees, or if there be no trustee, the debtor and any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may direct the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making

such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Such final decree shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid.”

(b) Because, even though this court theretofore never had obtained jurisdiction over the persons of said respondents in the particular proceedings now under consideration, it did so when, through their attorneys, Messrs. Byrne, Lamson & Jordan, they came into these proceedings, and, *despite the fact that they purported to be appearing specially*, asked “the above entitled court to stay all further proceedings herein as to them, and each of them, with reference to that certain order entitled ‘Order Fixing Time for Hearing of Petition; Appointing Special Master; and Referring Petition and Other Matters to Special Master’ issued herein by Honorable A. F. St. Sure, one of the judges of the above entitled court, on March 3, 1941, until such time as the said court in the above entitled proceeding shall have acquired jurisdiction of the persons of said Harold M. F. Behneman and said Gladys M. Shores.” [259]

In this connection, see *Ruckstell Sales & Mfg. Co. v. Starr Transmission Corp.* (D.C., S.D., Calif.) 13 F. (2d) 478, 480, wherein it was held that even

though the appearance was designated as "special" it in law was "general" where a stay of proceedings was requested.

(c) Because even though this court theretofore never had obtained jurisdiction over the persons of said respondents, it did so when, through their attorneys, Messrs. Byrne, Lamson & Jordan, they came into this proceeding, and, *despite the fact that they purported to be appearing specially*, moved the above entitled court for a dismissal of the petitions hereinbefore referred to "upon the ground that the above entitled court lacks jurisdiction in this proceeding over the issues raised by, and the subject matter referred to and described in, said above mentioned petitions filed herein on February 19, 1941 and on March 11, 1941, or to grant the relief prayed for in said petitions, or either of said petitions, and upon the further ground that neither of said petitions states a claim against Harold M. F. Behneman and Gladys M. Shores, or either of them, upon which relief can be granted."

See *Elliott v. Lawhead* (S. Ct., Ohio) 1 N.E. 577, 580, 43 Ohio St. 171, 176, wherein the court said, "The overruling of the motion to dismiss is assigned as error. This motion assigns two reasons why it should be granted: *First*, want of legal and proper service; and, *second*, because the court had no jurisdiction of the *subject-matter*. This last ground was in the nature of a demurrer to the jurisdiction of the court, and was in itself an appearance

in the case. It amounted to a waiver of service, and gave the court jurisdiction over the person of defendant. It is true, the defendant 'comes for the purpose of filing this motion, and for no other purpose;' and had the motion been confined to the want of proper service it would not have operated as an appearance. [260] It was not so limited, but embraced an additional reason, to-wit, the right of the court to hear and determine the subject matter. The rule is that where a defendant appears *solely* for the purpose of objecting to the jurisdiction of the court over his person, such motion is not a voluntary appearance of defendant which is equivalent to service. Where, however, the motion involves the merits of the case made in the petition, the rule is otherwise. *Handy v. Insurance Co.*, 37 Ohio St. 366; *Maholm v. Marshall*, 29 Ohio St. 611. Here one of the grounds of objection, as raised first by the motion and afterwards by the demurrer, was that defendant was not liable in that court; or, in other words, the court had no jurisdiction over her as a married woman to grant the relief prayed for. This was a waiver of service, or a voluntary appearance of defendant equivalent to service."

See, also, *King v. Ingels*, (S. Ct. Kans.) 250 Pac. 306, 307. In that case the court stated, ". . . if defendant . . . had limited their motion to quash to a simple challenge of the court's jurisdiction, the ruling of the trial court in their favor might have been unassailable.

“But those defendants did not so limit the recitals of their motion to quash. They pleaded:

“*‘The petition herein fails to state any cause of action against the said . . . and these defendants or any of them.’*”

“The italicized recital in this pleading was in substance a demurrer to plaintiffs’ petition. It raised a question of law on the merits of the action, and invoked the judgment of the court thereon; and in consequence the filing of such a pleading had the effect of a general appearance.”

The rule as to a general appearance is thus stated in 4 Corpus Juris, 1333, [§27]: “Broadly stated, any action on the part of a defendant, except to object to the jurisdiction over his person which recognizes the case as in court, will constitute a general appearance.” [261]

As was said by Mr. Justice Holmes in *Merchants Heat & Light Co. v. Clow & Sons*, 204 U.S. 286, 280, 27 S. Ct. 285, 286, 51 L. Ed. 488, 490, “There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits.”

In the language of *Leonardi v. Chase Nat. Bank of City of New York*, (C.C.A. 2) 81 F. (2d) 19, 20, (certiorari denied by Supreme Court of United States, 298 U.S. 677, 56 S. Ct. 941, 80 L. Ed. 1398), “A general appearance is entered whenever the

defendant invokes the judgment of the court in any way, on any question other than the court's jurisdiction without being compelled to do so by previous rulings of the court sustaining jurisdiction.

It is to be noted that when respondents made their motion for dismissal, based in part on the ground that "neither of said petitions states a claim against Harold M. F. Behneman and Gladys M. Shores, or either of them, upon which relief can be granted," no ruling theretofore had been made sustaining the court's jurisdiction in connection with the petitions here under discussion, and hence it can not be contended that said respondents were compelled to use said last mentioned ground as a basis of said motion.

Findings of Fact and Conclusions of Law

Based upon the record herein I find and conclude that this court has jurisdiction over the subject matter of the petitions filed herein on February 19, 1941, and March 11, 1941, and that said court has jurisdiction over the persons of Harold M. F. Behneman and Gladys M. Shores, and over each of their said persons.

I also find and conclude that said respondents are, and each of them is, entitled to the process of this court to have produced any competent evidence that they, or either of them, may be desirous of offering, whether said evidence is sought to be given [262] by witnesses orally or by documentary evidence, not including affidavits.

Recommendations of Special Master

I therefore respectfully recommend that after a hearing held on this certificate and report, the court, in effect, make its order that said motions of said respondents, Harold M. F. Behneman and Gladys M. Shores, and of each of them, be overruled, and that said respondents, and each of them, be given ten (10) days from and after the date of said order within which to make response upon the merits to said petitions filed herein on February 19, 1941, and March 11, 1941, if said respondents, or either of them, be so advised, and that the hearing on said petitions, upon the merits, held before the court directly or before a special master, be fixed in said order for a day certain in accordance with the condition of the court's calendar or the condition of the special master's calendar, and that in the meantime the restraining order and/or restraining orders remain in full force and effect until vacated or modified by further order of this court, after notice and hearing.

Papers Handed Up Herewith

I hand up herewith the following papers:

(1) Motion to Dismiss Petitions and to Vacate and Dissolve Temporary Injunction;

(2) Respondents' Exhibit No. 1 of March 18, 1941—Certified Copy of Complaint for Declaratory Relief; For Injunctive Relief, and For Cancellation of Certain Stock Certificates;

(3) Respondents' Exhibit No. 2 of March 18, 1941—Certified Copy of Complaint for Declaratory

Relief: For Injunctive Relief, and For Cancellation of Certain Stock Certificates;

(4) Respondents' Exhibit No. 3 of March 18, 1941—Certified Copy of Shareholder's Petition for Court Supervision [263] Over the Voluntary Winding up of Corporation Affairs;

(5) Petitioners' Memorandum of Points and Authorities in Opposition to Respondents' Motion to Stay Proceedings;

(6) Petitioners' Supplemental Memorandum of Points and Authorities in Opposition to Respondents' Motion to Stay Proceedings, and

(7) Letter dated March 21, 1941, from Byrne, Lamson & Jordan, addressed to Burton J. Wyman.

Dated: March 28th, 1941.

Respectfully submitted,

BURTON J. WYMAN

Special Master

[Endorsed]: Filed Mar. 28, 1941. [264]

[Title of District Court and Cause—No. 25937-S.]

MOTION TO DISMISS PETITIONS AND TO
VACATE AND DISSOLVE TEMPORARY
INJUNCTION.

To the Honorable A. F. St. Sure, one of the judges of the above entitled court, and to the Honorable Burton J. Wyman, Special Master herein:

Harold M. F. Behneman and Gladys M. Shores, herein referred to as Respondents, reserving all objections to the jurisdiction of the above entitled court over their persons, as set forth in their joint Motion to Stay Proceedings filed herein on March [265] 6, 1941, hereby move the Honorable, the above entitled court, for an order dismissing the petition heretofore filed in the above captioned proceedings on February 19, 1941, entitled "Petition for Order Aiding, Enforcing, Effectuating and Protecting the Adjudication, Order and Decree of the Above Entitled Court Confirming Plan of Reorganization and Directing Reorganization of Debtor Pursuant Thereto, and Preventing and Enjoining the Threatened Interference With and Defeat of Said Adjudication, Order and Decree and the Jurisdiction of the Above Entitled Court", and for an order dismissing the petition filed in the above captioned proceedings, on March 11, 1941, entitled "Petition for Order Restraining and Staying Pending Actions", and for an order dissolving and vacating the order of the above entitled court, duly made and entered herein on March 11, 1941, entitled "Order Restraining and Staying Pending Actions".

This motion will be made upon the ground that the above entitled court lacks jurisdiction in this proceeding over the issues raised by, and the subject matter referred to and described in, said above mentioned petitions filed herein on February 19, 1941 and on March 11, 1941, or to grant the relief prayed for in said petitions, or either of said petitions, and upon the further ground that neither of said petitions states a claim against Harold M. F. Behneman and Gladys M. Shores, or either of them, upon which relief can be granted.

This motion will be based upon documentary evidence to be introduced at the time of the hearing on this motion, and upon all of the records, papers and files herein.

Dated: March 17th, 1941.

BYRNE, LAMSON & JORDAN
PAUL S. JORDAN

Attorneys for Harold M. F.
Behneman and Gladys M.
Shores, herein referred to as
Respondents.

[Endorsed]: Filed with Special Master Mar. 17, 1941.

[Endorsed]: Filed Mar. 28, 1941. [266]

In the Superior Court of the State of California,
in and for the City and County of San Francisco

No. 299573

HAROLD M. F. BEHNEMAN,

Plaintiff,

vs.

HENDY REALIZATION CO., a corporation (formerly The Joshua Hendy Iron Works), A. J. MAYMAN, C. B. MOORES, E. PRICE, A. E. WEBBER and W. R. BASSICK, individually and as the Directors of Hendy Realization Co., ELMER M. HYLAND, MORRIS LEVIT, FIRST DOE, SECOND DOE and THIRD DOE,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF;
FOR INJUNCTIVE RELIEF, AND FOR
CANCELLATION OF CERTAIN STOCK
CERTIFICATES.

The above named plaintiff complains of the above named defendants, and each of them, and for cause of action alleges:

I

At all of the times herein mentioned, defendant Hendy Realization Co. has been and now is, a corporation, duly organized and existing under and by virtue of the laws of the State of California; prior to on or about December 4, 1940, the name of said corporation was The Joshua Hendy Iron Works, and it is hereinafter sometimes referred to as such; on or about said last mentioned date, said corporate

name was, by amendment of the Articles of Incorporation of said company, changed to Hendy Realization Co.; said company will hereinafter, for convenience, some- [267] times be referred to as the "Hendy Co."

II

Plaintiff does not now know the true names of the defendants herein sued under the fictitious names of First Doe, Second Doe and Third Doe, but prays that when said true names are ascertained they may be inserted herein in place and stead of said fictitious names.

III

Since on or about March 24, 1936, the above named defendants, Mayman, Moores, Price, Webber and Bassick, continuously have been, and now are, the duly appointed, qualified and acting Directors of the Hendy Co.; from on or about March 24, 1936, and continuously thereafter up to on or about November 15, 1940, the above named defendants, Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, were employees of Hendy Co. and as such were, during said period, fully compensated for services rendered to said corporation; plaintiff is informed and believes, and therefore alleges, that for said period commencing on or about March 24, 1936 and ending on or about November 15, 1940, the said defendant Bassick was continuously the duly appointed, qualified and acting President and General Manager of Hendy Co.; plaintiff is further informed and believes, and therefore alleges, that none

of said defendants Hyland, Levit, First Doe, Second Doe or Third Doe were officers of said corporation at any time during said last mentioned period.

IV

Plaintiff is now, and continuously since March 24, 1936 has been, the owner of six hundred twenty-two and one-quarter ($622\frac{1}{4}$) shares of the capital stock of Hendy Co.

V

No demand has been made by plaintiff upon defendant [268] Hendy Realization Co. to bring this action, for the reason that defendants Mayman, Moores, Price, Webber and Bassick constitute the entire Board of Directors of said corporate defendant, and, together with defendants Hyland, Levit, First Doe, Second Doe and Third Doe, are the persons against whom relief is herein sought; the making of demand upon said defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the defendant Hendy Co., would therefore be a useless and idle act; the Hendy Co. has accordingly been named as a party defendant herein, and this action is brought for and on behalf of said corporation and all stockholders thereof, other than defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as the holders of the twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of said corporation distributed to them in the manner and under the circumstances set forth in Paragraph XV of this complaint.

VI

On or about March 4, 1935, The Bank of California National Association, a corporation, Moore Dry Dock Company, a corporation, and Baker-Hamilton & Pacific Company, a corporation, as creditors of the Hendy Co., filed a joint petition in the United States District Court for the Northern District of California, Southern Division, for the corporate reorganization of said company under the provisions of Section 77B of the National Bankruptcy Act; on March 21, 1935, said United States District Court, being satisfied that said petition was properly filed and that the same complied in all respects with the provisions of said Section 77B of the Bankruptcy Act, entered its order approving said petition as properly filed under said Section 77B; the proceedings thus commenced in said United States [269] District Court were entitled "In the Matter of The Joshua Hendy Iron Works, a corporation, Debtor", and were numbered 25937-S in the records of said court.

VII

On September 25, 1935, the above mentioned creditors of the Hendy Co. who filed the original petition for the corporate reorganization of said company, as aforesaid, together with Albertie M. Hendy, a stockholder of said company, filed in said reorganization proceedings a proposed plan for the reorganization of said company; said Plan of Reorganization was thereafter fully and in all respects ac-

cepted by creditors and stockholders of the Hendy Co. whose interests were affected thereby, as required by the provisions of said Section 77B of the Bankruptcy Act, and on March 24, 1936, by order duly given and made by Hon. A. F. St. Sure, one of the judges of said United States District Court, said Plan of Reorganization was approved and confirmed, and the Hendy Co., as the debtor in said reorganization proceedings, was authorized, empowered and directed to forthwith reorganize and put into effect and carry out the provisions of said Plan of Reorganization and the orders of said United States District Court relative thereto.

VIII

At the time of the approval by said United States District Court of said Plan of Reorganization, as aforesaid, there were forty-four hundred and twenty-five (4425) shares of the capital stock of the Hendy Co. outstanding, and the said company, as of July 31, 1935, had outstanding obligations, both secured and unsecured, amounting to approximately Six Hundred Twenty-three Thousand One Hundred Seventy and 14/100ths Dollars (\$623,170.14); under the terms of said Plan of Reorganization, [270] said obligations were reduced by from ten per cent (10%) to fifteen per cent (15%), depending upon their classification, and payment of all of said obligations was deferred for a period of five years; the total amount of said obligations, as reduced and deferred under said Plan, amounted to the sum of

Five Hundred Forty-nine Thousand Three Hundred Seventeen and 04/100ths Dollars (\$549,317.04).

IX

Paragraph 68 of said Plan of Reorganization provided as follows:

“G. Capital stock.

4425 shares of the capital stock of the debtor corporation are now outstanding, said shares having a book value of \$212,898.51, but no actual value.

In consideration of the extensions granted by the creditors and of the reduction of their claims in the sum of \$73,853.06, as aforesaid, the stockholders shall appropriately endorse and deliver the stock held by them to the Board of Directors of the debtor corporation, appointed as hereinafter provided, to be held by said Board as follows:

1. 50% of the shares so deposited by each stockholder shall be held in trust and voted by said Board for a period of 5 years, and thereafter until the extended obligations are fully paid, so as to leave the management of the debtor corporation during such period in the hands of its creditors. The Board shall have full power to vote said stock, including the power to vote for a reorganization of the capital structure of the debtor corporation so as to provide, at any time, for an issue of one or more classes of preferred stock and

the exchange therefor of any part or all of the unsecured liabilities of the debtor corporation. Upon the expiration of 5 years and the payment in full of the extended obligations, such shares shall be returned to their respective owners.

2. The remaining 50% of the shares so delivered by each stockholder shall be held by said Board free and clear of any claim, right, title or interest therein by such stockholder, to be distributed by said Board, in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company's affairs." [271]

X

Paragraph 8 of said Plan of Reorganization provided in part as follows:

"8. Effect.

While this plan of reorganization will not expunge any of the liabilities of the debtor corporation by transferring them into capital, it will definitely postpone the payment of both principal and interest on prereceivership obligations (excepting from proceeds of assets already allocated as security and therefore not available for working capital) for a sufficiently long period to give the new management an opportunity to resuscitate the debtor corporation, while at the same time the rate of interest is

materially reduced. The mere deferment of payment does not, of course, satisfy either principal or interest; but it is manifest that the definite postponement of the payment of all interest and prereceivership liabilities for five years (so that, during such period, the debtor corporation will only be required to pay its current operating expenses, taxes, and the small balance of its receivership accounts), will afford the new management a reasonable opportunity for rehabilitation. If the affairs of the debtor corporation cannot be restored within this period, drastic measures, perhaps even abandonment, will be necessary. If, however, substantial progress is made, any necessary further funding should be readily accomplished.”

XI

Immediately subsequent to the confirmation of said Plan of Reorganization by the said United States District Court on March 24, 1936, as aforesaid, and pursuant thereto, defendants Mayman, Moores, Price, Webber and Bassick became the Directors of the Hendy Co., and as such became the Voting Trustees of the fifty per cent (50%) of the outstanding stock of said company which was retained by its stockholders under Paragraph 6G1 of said Plan, and as such Directors and Voting Trustees said defendants proceeded to carry the said Plan into effect; the affairs of the Hendy Co. ever since have been and now are conducted by, and the

business of said company ever since has been and now is managed under the supervision of, said last named defendants, as such Directors. [272]

XII

Prior to, and at the time of, the confirmation of said Plan of Reorganization on March 24, 1936, as aforesaid, plaintiff was the owner of twelve hundred forty-four and one-half ($1244\frac{1}{2}$) shares of stock of The Joshua Hendy Iron Works; subsequent to said confirmation date, and pursuant to the provisions of Paragraph 6G of said Plan of Reorganization, plaintiff deposited his said twelve hundred forty-four and one-half ($1244\frac{1}{2}$) shares with said defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of The Joshua Hendy Iron Works; upon such deposit there were executed between plaintiff and said last named defendants, in duplicate, a Trustees' Receipt and Certificate evidencing ownership by plaintiff thereafter of an aggregate of six hundred twenty-two and one-quarter ($622\frac{1}{4}$) shares, that is to say, fifty per cent (50%) of plaintiff's said original shareholdings, which shares were thereafter held by said last named defendants as such Directors and Trustees, pursuant to the terms of Paragraph 6G1 of said Plan of Reorganization and said Trustees' Receipt and Certificate, up to December 28, 1940; copies of said Trustees' Receipts and Certificates are attached hereto, marked Exhibits "A" and "B" and made a part hereof; the other fifty per cent (50%) of plain-

tiff's said original shareholdings, that is to say, six hundred twenty-two and one-quarter ($622\frac{1}{4}$) shares, which were deposited with defendants Mayman, Moores, Price, Webber and Bassick, as aforesaid, were thereafter held by said last mentioned defendants, as the Directors of the Hendy Co., pursuant to Paragraph 6G2 of said Plan, until on or about December 20, 1940, when they were disposed of in the manner described in Paragraph XV of this complaint.

XIII

On or about November 4, 1940, the Hendy Co. granted an [273] option to MacDonald & Kahn, Inc., a corporation, for the sale of the Hendy Co.'s Sunnyvale, California, plant and equipment, which properties represented the principal and all operating assets of said company; on November 15, 1940, MacDonald & Kahn, Inc. exercised said option and purchased said properties for an amount which plaintiff is informed and believes, and therefore alleges, was slightly in excess of Four Hundred Thousand Dollars (\$400,000), and plaintiff is further informed and believes, and therefore alleges, that said sale has been fully consummated; since its incorporation in 1906 the Hendy Co. has been, and continuously up to on or about November 15, 1940 was, engaged in the general foundry and metal products manufacturing business, with the production department of its business being conducted entirely at said Sunnyvale plant; by reason of the sale of said principal and all of the operating assets of the

company, i.e., the said Sunnyvale plant and equipment, the continuation of the company in the said business has now been rendered impossible.

XIV

Since the confirmation of said Plan of Reorganization of the Hendy Co. on March 24, 1936, no dividends have been paid or declared upon any of the outstanding stock of said company, and said company has not, at any time since said last mentioned date, been financially in a condition which would permit the payment of such dividends; plaintiff is informed and believes, and therefore alleges, that on November 15, 1940, the date of the above mentioned sale of the principal and all operating capital assets of the Hendy Co. to MacDonald & Kahn, Inc., there still remained unpaid more than Two Hundred Thousand Dollars (\$200,000) of the approximate Five Hundred Forty-nine Thousand Three Hundred Seventeen and 04/100ths Dollars (\$549,317.04) of reduced and deferred obligations of the Hendy Co. covered by said Plan [274] of Reorganization; subsequent to November 15, 1940, all of said remaining Two Hundred Thousand Dollars (\$200,000) or more of reduced and deferred obligations covered by said Plan of Reorganization were fully paid, but plaintiff is informed and believes, and therefore alleges, that in order to make such payment the above named defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the Handy Co., were forced to, and did, resort to the moneys derived

from the said sale of capital assets of the Hendy Co. to MacDonald & Kahn, Inc.

XV.

Plaintiff is informed and believes, and therefore alleges, that shortly prior to December 20, 1940, the exact date being at this time unknown to plaintiff, and notwithstanding the matters hereinabove alleged, defendants Mayman, Moores, Price, Webber and Bassick, acting as the Board of Directors of the Hendy Co., and pursuant to Paragraph 6G2 of the said Plan of Reorganization of the Hendy Co., proceeded to distribute to defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe all of the twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of said company previously held by said Directors under said Paragraph 6G2 of said Plan, which twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares represent the fifty per cent (50%) of the stock of said company outstanding on March 24, 1936, and surrendered to defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the Hendy Co., by plaintiff and the other then stockholders of said company, pursuant to Paragraph 6G of said Plan of Reorganization; the exact proportions in which said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock were distributed to said defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe is at this time unknown to plaintiff; on or

about November 23, 1940, and prior to the distribution of said twenty-two hundred twelve [275] and one-half ($2212\frac{1}{2}$) shares to said last mentioned defendants, as aforesaid, plaintiff notified defendants Mayman, Moores, Price, Webber and Bassick, as Directors of the Hendy Co., in writing, that in his opinion the affairs of the Hendy Co. had not been successfully rehabilitated, and requested that he (plaintiff) be notified by said Directors in advance of any such stock distribution to managing officers of the Hendy Co. in order that plaintiff might take appropriate action to protect his rights and interests; notwithstanding plaintiff's said notification and request, and in complete disregard thereof, and without any prior notification to plaintiff, said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares were distributed to defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as managing officers of the Hendy Co., in the manner hereinabove set forth.

XVI.

On December 20, 1940, proceedings for the winding up and dissolution of the Hendy Co. were commenced by the adoption of a resolution by the vote of persons allegedly entitled to vote and holding shares representing fifty per cent (50%) or more of the voting power of all of the outstanding capital stock of said company, stating the election of the Hendy Co. and its stockholders to wind up its affairs and voluntarily dissolve; on or about Decem-

ber 21, 1940, notice of the commencement of such dissolution proceedings was mailed by defendant Mayman, as Secretary of the Hendy Co., to plaintiff and all other stockholders and Voting Trustees' Receipt and Certificate holders of said company, which said notice was received by plaintiff on or about December 23, 1940.

XVII.

On December 21, 1940, at a duly and regularly called [276] meeting of the Board of Directors of the Hendy Co., defendants Mayman, Moores, Price, Webber and Bassick, acting as the Directors of said company, proceeded to terminate the Voting Trust created by Paragraph 6G of said Plan of Reorganization of the Hendy Co. and to declare a first liquidating dividend of Forty-five Dollars (\$45) per share in favor of plaintiff and the other holders of all of the then outstanding Trustees' Receipts and Certificates of the Hendy Co. issued pursuant to Paragraph 6G1 of said Plan of Reorganization; on said last mentioned date there were outstanding Trustees' Receipts and Certificates of the Hendy Co. evidencing ownership of a total of nineteen hundred seven and three-quarters ($1907\frac{3}{4}$) shares of the capital stock of said company, six hundred twenty-two and one-quarter ($622\frac{1}{4}$) of which then were, and now are, owned by plaintiff; in declaring said first liquidating dividend of Forty-five Dollars (\$45) per share, as aforesaid, defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the Hendy Co., specifically excluded from

participation therein the twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of said company previously distributed by them to defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as aforesaid.

XVIII.

Defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the Hendy Co., contend that the affairs of said company have been successfully rehabilitated, and in accordance with this contention have distributed to defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as the alleged managing officers of the Hendy Co., said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of the outstanding stock of said company, pursuant to Paragraph 6G2 of said Plan of Re- [277] organization, all as set forth in Paragraph XV of this complaint; by reason of such distribution of said stock to said defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, all defendants contend that defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as the owners of said stock, will be entitled to receive future liquidating dividends declared by the Hendy Co. upon an equal pro rata basis with plaintiff and the other stockholders of the Hendy Co. who, under the provisions of Paragraph 6G of said Plan, were required to surrender said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares to defendants Mayman, Moores, Price, Webber and Bassick, as aforesaid; and de-

defendants Mayman, Moores, Price, Webber and Bassick, as Directors of the Hendy Co., have threatened to, and will unless restrained by an order of this court, cause future liquidating dividends declared by the Hendy Co. to be paid to said defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, upon said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares now collectively held by them, upon an equal pro rata basis with plaintiff and the other stockholders of the Hendy Co.; plaintiff is informed and believes, and therefore alleges, that there will hereafter be available for distribution by the Hendy Co. to its shareholders, as liquidating dividends, an amount in excess of Sixty Thousand Dollars (\$60,000), more than fifty per cent (50%) of which will be paid by defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the Hendy Co., to defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, on said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares now held by them, unless such payment is restrained by an order of this court; plaintiff contends that the term "successful rehabilitation", as used in Paragraph 6G2 [278] of said Plan of Reorganization, contemplated full payment of the reduced and deferred obligations covered by said Plan out of earnings of the Hendy Co. derived from the operation of its business as a going concern, to the end that the capital assets thereof might be preserved for the benefit of its stockholders, and to the end that the control and

management of the affairs of the company as a going concern might be ultimately returned to said stockholders; that said term "successful rehabilitation" as used in Paragraph 6G2 of said Plan did not contemplate payment of said reduced and deferred obligations, or any part thereof, out of proceeds of the sale of all operating capital assets and the corporate name and good will of the Hendy Co., followed by a winding up and dissolution of said company.

XIX.

By reason of the facts hereinabove set forth, plaintiff alleges that the affairs of the Hendy Co. have not been successfully, or at all, rehabilitated and that defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of said company, accordingly had no right or discretion in the matter of distributing the said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of said company, or any of said shares, to defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as the alleged managing officers of said company, either pursuant to Paragraph 6G2 of said Plan of Reorganization, or otherwise, and that said share distribution was therefore illegal and void; and plaintiff, by reason of the facts hereinabove set forth, further alleges that defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the Hendy Co., have no right to cause any liquidating dividends hereafter declared by the Hendy Co. in favor of its stockholders to be paid to

said defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe on said twenty- [279] two hundred twelve and one-half ($2212\frac{1}{2}$) shares heretofore distributed to, and now collectively held by, them, as aforesaid, but that all such liquidating dividends should be declared only in favor of, and should only be paid to, plaintiff and the other owners and holders of the nineteen hundred seven and three-quarters ($1907\frac{3}{4}$) shares of Hendy Co. stock which, from March 24, 1936 to December 21, 1940, were subject to the Voting Trust created by said Plan of Reorganization; an actual controversy has accordingly arisen as to the rights and duties of the parties hereto with respect to: (1) the provisions of Paragraph 6G2 of said Plan of Reorganization; (2) the title to and disposition of the twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of said company heretofore distributed to, and now held by, said defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as aforesaid; and (3) the future distribution of all liquidating dividends hereafter declared by the Hendy Co. in favor of its stockholders.

Wherefore, plaintiff prays as follows:

1. For a judgment declaring and determining the rights and duties of the parties hereto with respect to each other under Paragraph 6G of said Plan of Reorganization;

2. For a judgment declaring and determining the rights and duties of the parties hereto with re-

spect to the disposition of the twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of the Hendy Co. heretofore distributed to, and now held by, defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe under the circumstances hereinabove set forth;

3. For a judgment declaring and determining the rights and duties of the parties hereto with respect to the future dis- [280] tribution of all liquidating dividends hereafter declared by the Hendy Co. to its shareholders, and particularly with reference to whether any such liquidating dividends should be paid on said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of said company heretofore distributed to, and now held by, said defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as hereinabove set forth, or whether payment of all such future liquidating dividends should be restricted to the nineteen hundred seven and three-quarters ($1907\frac{3}{4}$) shares of stock of the Hendy Co. which, from March 24, 1936 to December 21, 1940, were subject to the Voting Trust created by Paragraph 6G1 of said Plan of Reorganization;

4. That defendants Mayman, Moores, Price, Webber and Bassick, and each of them, individually and as Directors of the Hendy Co., and their successors in office, and defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, as the present holders of said twenty-two hundred twelve

and one-half ($2212\frac{1}{2}$) shares of stock of said company, be required to account for all of said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock, as well as for any and all liquidating dividends of the Hendy Co. that may be hereafter declared and paid on said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock;

5. That defendant Hendy Co. and defendants Mayman, Moores, Price, Webber and Bassick, and each of them, individually and as Directors of the Hendy Co., and their successors in office, and their agents, servants, employees, attorneys and those acting in aid or assistance of them, be permanently restrained and enjoined from declaring or causing to be declared, and from paying or causing to be paid from the assets of the Hendy Co., any liquidating or other dividends that may hereafter become due [281] and payable to the stockholders of the Hendy Co., either by reason of the winding up and dissolution of said company, or otherwise, to defendants Bassick and/or Hyland and/or Levit and/or First Doe and/or Second Doe and/or Third Doe, or to any other present or future holder of the, or any of the, twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of the Hendy Co. distributed to said last mentioned defendants by defendants Mayman, Moores, Price, Webber and Bassick, as the Directors of the Hendy Co., pursuant to Paragraph 6G2 of said Plan of Reorganization, as hereinabove set forth;

6. That the distribution of said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares to defendants Bassick, Hyland, Levit, First Doe, Second Doe and Third Doe, pursuant to Paragraph 6G2 of said Plan of Reorganization, be declared illegal and void, and that said last mentioned defendants, and each of them, and/or their successors in interest, or the successor in interest of any of them, be required by an order of this court to surrender to the Hendy Co. any shares of said company now held by them, or any of them, and which form any part of said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares distributed to said last mentioned defendants, pursuant to Paragraph 6G2 of said Plan of Reorganization, as hereinabove set forth, and that following such surrender defendants Mayman, Moores, Price, Webber and Bassick, and each of them, as the Directors of the Hendy Co., be required by an order of this court to cancel all of the certificates evidencing said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares and to retire the same to the treasury of the Hendy Co.;

7. That plaintiff be allowed his costs of suit incurred herein; and [282]

8. That plaintiff be granted such other and further relief as to the court may seem just, proper and equitable in the premises.

BYRNE, LAMSON & JORDAN

Attorneys for Plaintiff. [283]

EXHIBIT "A"

Trustees' Receipt and Certificate

The undersigned, who comprise the Board of Directors of The Joshua Hendy Iron Works, hereby acknowledge receipt from W. R. Bassick, trustee for The Joshua Hendy Iron Works, of a certificate or certificates for 470 shares of the capital stock of The Joshua Hendy Iron Works, endorsed to the undersigned, evidencing the ownership of said shares by Harold M. F. Behneman;

And the undersigned, for themselves and their successors, further acknowledge that said shares are held and are to be held in irrevocable trust by the undersigned, and their successors, as trustees for the benefit of the owner thereof hereinabove named, pursuant to the provisions of Section 23 of, and Paragraph G(2) of the plan of reorganization confirmed by, the Order of the United States District Court in and for the Northern District of California, Southern Division, duly given, made, and entered on March 24, 1936, in that certain proceeding numbered 25937-S therein, entitled "In the Matter of The Joshua Hendy Iron Works, a corporation, Debtor," which said Order is especially referred to and incorporated herein by reference, for a period of five (5) years from March 24, 1936, and thereafter until all of the extended obligations of The Joshua Hendy Iron Works issued and executed pursuant to the plan of reorganization confirmed by said Order dated March 24, 1936, are fully paid. During such period, the undersigned, as trustee, shall, as provided in said Order and

said plan of reorganization, possess and be entitled to exercise the right to vote, in their best judgment, all of said shares for all purposes at all regular and special meetings of the shareholders of The Joshua Hendy Iron Works, and may vote for, do, or assent or consent to any act or proceeding which the shareholders of The Joshua Hendy Iron Works might or could vote for, do, or assent or consent to, including the power to vote for a reorganization of the capital structure of the debtor corporation so as to provide, at any time, for an issue of one or more classes of preferred stock and the exchange therefor of any part or all of the unsecured liabilities of The Joshua Hendy Iron Works; provided that in voting for, and upon the election of, directors of The Joshua Hendy Iron Works, the undersigned trustees shall vote for the respective nominees of the majority of the stockholders and creditors, nominated as provided in Paragraph 7 of said plan of reorganization and the By-Laws of The Joshua Hendy Iron Works. No voting rights shall exist in the holder hereof by virtue of the ownership of this trustees' receipt and certificate.

Upon the expiration of the period of five years from March 24, 1936, and the payment in full of all of said extended obligations of The Joshua Hendy Iron Works issued pursuant to the plan for its reorganization, as aforesaid, whichever shall last happen, the trust hereby expressed shall terminate, and the undersigned, or their successors, shall

assign and deliver said shares to the order of the owner or owners thereof hereinabove named, upon the surrender to the undersigned, or their successors, of this receipt and certificate.

If, as, and when any of the undersigned trustees shall cease to be a director of The Joshua Iron Works, such trustees shall, ipso facto, cease being trustees under the trust hereby expressed, and the person or persons elected or appointed to fill such vacancy or vacancies in the Board of Directors of The Joshua Hendy Iron Works shall automatically become trustees hereunder. [284]

This receipt and certificate is executed in duplicate, one to be retained by the undersigned trustees, and one to be retained by the beneficiary, and is assignable, with the right of issuance of a new receipt and certificate of like tenor, only upon the surrender to the undersigned or their successor directors in office of the beneficiary's receipt and certificate properly endorsed. The beneficiary approves and confirms the terms of the trust hereby created by accepting this receipt and certificate.

(Signed)	A. J. MAYMAN
(Signed)	C. B. MOORES
(Signed)	W. R. BASSICK
(Signed)	E. H. PRICE
(Signed)	A. E. WEBBER

Trustees.

(Signed)	HAROLD M. F. BEHNEMAN, Beneficiary. [285]
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EXHIBIT "B"

Trustee's Receipt and Certificate

The undersigned, who comprise the Board of Directors of The Joshua Hendy Iron Works, hereby acknowledge receipt from W. R. Bassick, trustee for The Joshua Hendy Iron Works, of a certificate or certificates for $152\frac{3}{4}$ shares of the capital stock of The Joshua Hendy Iron Works, endorsed to the undersigned, evidencing the ownership of said shares by Harold M. F. Behneman;

And the undersigned, for themselves and their successors, further acknowledge that said shares are held and are to be held in irrevocable trust by the undersigned, and their successors, as trustees for the benefit of the owner thereof hereinabove named, pursuant to the provisions of Section 23 of, and Paragraph G(2) of the plan of reorganization confirmed by, the Order of the United States District Court in and for the Northern District of California, Southern Division, duly given, made, and entered on March 24, 1936, in that certain proceeding numbered 25937-S therein, entitled "In the Matter of The Joshua Hendy Iron Works, a corporation, Debtor," which said Order is especially referred to and incorporated herein by reference, for a period of five (5) years from March 24, 1936, and thereafter until all of the extended obligations of The Joshua Hendy Iron Works issued and executed pursuant to the plan of reorganization confirmed by said Order dated March 24, 1936, are

fully paid. During such period, the undersigned, as trustees, shall as provided in said Order and said plan of reorganization, possess and be entitled to exercise the right to vote, in their best judgment, all of said shares for all purposes at all regular and special meetings of the shareholders of The Joshua Hendy Iron Works, and may vote for, do, or assent or consent to any act or proceeding which the shareholders of The Joshua Hendy Iron Works might or could vote for, do, or assent or consent to, including the power to vote for a reorganization of the capital structure of the debtor corporation so as to provide, at any time, for an issue of one or more classes of preferred stock and the exchange therefor of any part or all of the unsecured liabilities of The Joshua Hendy Iron Works; provided that in voting for, and upon the election of, directors of The Joshua Hendy Iron Works, the undersigned trustees shall vote for the respective nominees of the majority of the stockholders and creditors, nominated as provided in Paragraph 7 of said plan of reorganization and the By-Laws of The Joshua Hendy Iron Works. No voting rights shall exist in the holder hereof by virtue of the ownership of this trustee's receipt and certificate.

Upon the expiration of the period of five years from March 24, 1936, and the payment in full of all of said extended obligations of The Joshua Hendy Iron Works issued pursuant to the plan for its reorganization, as aforesaid, whichever shall last happen, the trust hereby expressed shall

terminate, and the undersigned, or their successors, shall assign and deliver said shares to the order of the owner or owners thereof hereinabove named, upon the surrender to the undersigned, or their successors, of this receipt and certificate.

If, as, and when any of the undersigned trustees shall cease to be a director of The Joshua Hendy Iron Works, such trustees shall, ipso facto, cease being trustees under the trust hereby expressed, and the person or persons elected or appointed to fill such vacancy or vacancies in the Board of Directors of The Joshua Hendy Iron Works shall automatically become trustees hereunder. [286]

This receipt and certificate is executed in duplicate, one to be retained by the undersigned trustees, and one to be retained by the beneficiary, and is assignable, with the right of issuance of a new receipt and certificate of like tenor, only upon the surrender to the undersigned or their successor directors in office of the beneficiary's receipt and certificate properly endorsed. The beneficiary approves and confirms the terms of the trust hereby created by accepting this receipt and certificate.

(Signed) A. J. MAYMAN

(Signed) C. B. MOORES

(Signed) E. H. PRICE

(Signed) A. E. WEBBER

(Signed) W. R. BASSICK

Trustees.

(Signed) HAROLD M. F. BEHNEMAN

Beneficiary. [287]

State of California,
City and County of San Francisco—ss.

Harold M. F. Behneman, being first duly sworn, deposes and says: That he is the plaintiff named in the foregoing complaint; that he has read said complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

HAROLD M. F. BEHNEMAN

(Verification) [288]

In the Superior Court of the State of California
in and for the City and County of San Francisco.

No.

Action brought in the Superior Court of the State
of California in and for the City and County of
San Francisco, and the complaint filed in the
office of the County Clerk of said City and
County. Byrne, Lamson & Jordan, 1249 Russ
Building, San Francisco, Calif., Attorney for
Plaintiff.

HAROLD M. F. BEHNEMAN,

Plaintiff,

vs.

HENDY REALIZATION CO., a corporation
(formerly The Joshua Hendy Iron Works),
A. J. MAYMAN, C. B. MOORES, E.
PRICE, A. E. WEBBER and W. R. BAS-
SICK, individually and as the Directors of
Hendy Realization Co., ELMER M. HY-
LAND, MORRIS LEVIT, FIRST DOE,
SECOND DOE and THIRD DOE,

Defendants.

SUMMONS-GENERAL

The People of the State of California Send Greet-
ing to:

Hendy Realization Co., a corporation (formerly
The Joshua Hendy Iron Works), A. J. Mayman,

C. B. Moores, E. Price, A. E. Webber and W. R. Bassick, individually and as the Directors of Hendy Realization Co., Elmer M. Hyland, Morris Levit, First Doe, Second Doe and Third Doe, Defendants.

You Are Hereby Directed to appear and answer the complaint in an action entitled as above, brought against you in the Superior Court of the State of California, in and for the City and County of San Francisco, within ten days after the service on you of this summons—if served within this City and County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said Plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and seal of the Superior Court at the City and County of San Francisco, State of California.

Dated Jan. 6, 1941.

H. A. VAN DER ZEE,
Clerk.

By D. T. WOOD,
Deputy Clerk.

[Endorsed]: Filed with Spl. Master Mar. 18, 1941.

[Endorsed]: Filed Mar. 28, 1941. [289]

In the Superior Court of the State of California,
in and for the City and County of San Francisco.

No. 300741

In the Matter of the Voluntary Winding Up
and Dissolution

of

HENDY REALIZATION CO., a corporation.

SHAREHOLDER'S PETITION FOR COURT
SUPERVISION OVER THE VOLUNTARY
WINDING UP OF CORPORATE AFFAIRS

The petition of Harold M. F. Behneman respectfully represents:

I.

At all of the times herein mentioned, Hendy Realization Co. has been, and now is, a corporation, duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business situated in the City and County of San Francisco, State of California.

II.

At all of the times herein mentioned, your petitioner has been, and now is, the owner and holder of more than five per cent (5%) of the number of outstanding shares of capital stock of said Hendy Realization Co.

III.

Petitioner is informed and believes, and therefore alleges, that Hendy Realization Co. has elected

to wind up its affairs and [290] voluntarily dissolve, and that the proceedings for the winding up of said corporation were commenced on December 20, 1940 by the adoption of a resolution on said date by the vote of persons entitled to vote and holding shares representing fifty per cent (50%) or more of the voting power of all of the outstanding capital stock of said corporation, which resolution was in the words following, to wit:

“Whereas, it is deemed advisable and for the best interests of the shareholders of this corporation that it wind up its affairs and voluntarily dissolve;

“Now Therefore, Be It Resolved, that this corporation and its shareholders hereby elect to wind up its affairs and voluntarily dissolve.

“And Be It Further Resolved, that the officers and Directors of this corporation be and they are hereby authorized and directed to file such certificates, give such notices, and take such further action as they may deem necessary or desirable to wind up the affairs of this corporation and to dissolve it, and to effectuate the purposes of this resolution.”

IV.

Pursuant to the adoption of said resolution, as aforesaid, the certificate of election of Hendy Realization Co. to wind up its affairs and voluntarily dissolve was filed in the office of the Secretary of State of the State of California on December 2,

1940, and a copy of said certificate, duly certified by the said Secretary of State, was filed in the office of the County Clerk of the City and County of San Francisco, State of California, on December 4, 1940; said Hendy Realization Co. is now in the process of voluntarily winding up its affairs.

V.

Petitioner desires the court to assume supervision over the voluntary winding up of the affairs of said Hendy Realization Co., in the manner and for the purposes prescribed in Section 403 of the California Civil Code, in order that this court may have power to order and adjudge as to any and all matters in and for [291] the winding up of the affairs of said corporation, as set forth in said Section 403 of the California Civil Code.

Wherefore, petitioner prays that upon the filing of this petition the court prescribe such notice to Hendy Realization Co., and to such other persons interested in the said corporation as shareholders or creditors, as the court may think proper, notifying the said corporation (through its properly authorized officers or representatives), and such other persons to whom such notice may be given, to appear before this court at a time and place to be prescribed in said notice and show cause, if any they have, why this court should not assume supervision over any and all matters in and for the winding up of the affairs of said Hendy Realization Co.; and petitioner further prays that at the time of such hearing, or any continuation thereof,

this Court make such orders as may seem just, equitable, proper and consistent with said Section 403 of the California Civil Code.

HAROLD M. F. BEHNEMAN
Petitioner.

BYRNE, LAMSON & JORDAN
Attorneys for Petitioner.

[Endorsed]: Filed with Spl. Master Mar. 18, 1941.

[Endorsed]: Filed Mar. 28, 1941. [292]

[Title of District Court and Cause—No. 25937-S.]

OBJECTIONS OF RESPONDENTS HAROLD
M. F. BEHNEMAN AND GLADYS M.
SHORES TO CERTIFICATE AND RE-
PORT OF SPECIAL MASTER HEREIN
DATED MARCH 28, 1941.

Come now Harold M. F. Behneman and Gladys M. Shores, herein referred to as respondents, and object to the Certificate and Report of Hon. Burton J. Wyman, as Special Master, dated March 28, 1941 and filed herein on March 29, 1941, upon the following grounds:

1. That the individuals referred to as petitioners in the petitions filed herein on February 19, 1941 and March 11, 1941, to [293] wit, A. J. Mayman, C. B. Moores, E. H. Price, W. R. Bassick, E. M. Hyland and Morris Levit, which petitions are referred to in said Certificate and Report (see pages 1 to 13, inclusive, thereof, and pages 15 to 17, in-

clusive, thereof),* are not now, and never have been, parties to this proceeding; that said individual petitioners have never requested leave of this court to intervene as parties in this proceeding, nor have they ever sought the permission of this court to file said petitions; that said individual petitioners are accordingly not entitled to the relief prayed for in said petitions filed herein on February 19, 1941 and on March 11, 1941 (said relief being solely for the advantage and benefit of said individual petitioners and not for the advantage or benefit of petitioner Hendy Realization Co., formerly The Joshua Hendy Iron Works), or to avail themselves of the jurisdiction of this court in this proceeding;

2. That the relief sought in the actions of Behneman v. Hendy Realization Co., et al, San Francisco Superior Court No. 299,573, and Shores v. Hendy Realization Co., et al, San Francisco Superior Court No. 299,911 (now numbered 21792-S in the records of this court), further prosecution of which actions in said Superior Court was restrained by order of this court dated March 11, 1941 (see pages 18 to 20, inclusive, of said Certificate and Report of Special Master),† is against said individual petitioners and not against said Hendy Realization Co.; that said action of Shores v. Hendy Realization Co., et al, is an original plenary suit in which said individual petitioners herein are named as

*[Printer's Note: See pages 293 to 310 and pages 312 to 317 of this printed Record.]

†[See pages 317 to 319 of this printed Record.]

defendants, and is now pending in this court, having been removed from said Superior Court and filed in this court on or about February 24, 1941, and the motion of Gladys M. Shores, the plaintiff in said action and one of the respondents herein, to remand said action to said Superior Court having been denied by this [294] court on March 24, 1941; that in denying said motion to remand this court held that a Federal question was raised by plaintiff's complaint in said action, that is to say, that said suit was one arising under the laws of the United States, and that this court accordingly had jurisdiction thereof; that all issues raised by the said petitions filed herein on February 19, 1941 and on March 11, 1941 are raised by the complaint on file in this court in said action of Shores v. Hendy Realization Co., et al, and said issues can, and should accordingly, be determined in that action;

3. That this court lacks jurisdiction in this proceeding over the issues raised by, and the subject matter referred to and described in, said above mentioned petitions filed herein on February 19, 1941 and on March 11, 1941, and over the issues raised by, and the subject matter referred to and described in, the complaint in said action of Behneman v. Hendy Realization Co., et al, San Francisco Superior Court No. 299,573, the complaint in the said action of Shores v. Hendy Realization Co., et al, San Francisco Superior Court No. 299,911 (now numbered 21792-S in the records of this court), or in the petition for court supervision

over the voluntary winding up of the corporate affairs of Hendy Realization Co., San Francisco Superior Court No. 300,741, which petition was filed pursuant to the provisions of Section 403 of the California Civil Code (said complaints and said petition were introduced in evidence herein and marked respondents' Exhibits Nos. 1, 2 and 3, respectively, at the hearing before said Special Master held on March 18, 1941—see pages 23 and 24 of said Certificate and Report of Special Master);*

4. That jurisdiction over all matters pertaining to the reorganization of The Joshua Hendy Iron Works and to this proceeding, including the subject matter of the said petitions filed herein on February 19, 1941 and March 11, 1941, was finally [295] terminated and closed through entry by this court on January 27, 1937 of a final decree which contained no reservation of jurisdiction (see Paragraph 16 of said final decree), and the finding contained in said Certificate and Report of the Special Master to the effect that: "Based upon the record herein I find and conclude that this court has jurisdiction over the subject matter of the petitions filed herein on February 19, 1941 and March 11, 1941 . . ." is accordingly erroneous and unsupported by either law or fact.

Wherefore, respondents Harold M. F. Behneman and Gladys M. Shores pray that said petitions,

*[Printer's Note: See pages 323 and 324 of this printed Record.]

as filed herein on February 19, 1941 and on March 11, 1941, be dismissed in accordance with said respondents' motion to dismiss filed herein on March 17, 1941; that the temporary restraining order issued herein on March 11, 1941 be vacated and set aside; and that the said action of Shores v. Hendy Realization Co., et al, be brought to issue and trial in this court.

Dated: April 4th, 1941.

Respectfully submitted,

BYRNE, LAMSON & JORDAN
PAUL S. JORDAN

Attorneys for respondents Harold M. F. Behneman and Gladys M. Shores.

Admission of Service.

[Endorsed]: Filed Apr. 4, 1941. [296]

[Title of District Court and Cause—No. 25937-S.]

ANSWER OF RESPONDENTS HAROLD M. F. BEHNEMAN AND GLADYS M. SHORES TO PETITIONS FILED HEREIN BY THE ABOVE NAMED PETITIONERS ON FEBRUARY 19, 1941 AND ON MARCH 11, 1941.

Come now the above named respondents, Harold M. F. Behneman and Gladys M. Shores, and answering the petition filed herein by the above named petitioners on February 19, 1941, admit, deny and allege as follows:

I.

Said petition fails to state a claim against these answering respondents, or either of them, upon which relief can be [297] granted.

II.

The above entitled court lacks jurisdiction over the issues and subject matter referred to and described in said petition, or to grant the relief therein prayed for.

III.

Answering Paragraphs I, II, III, IV and V of said petition, these answering respondents admit each and every, all and singular, the allegations therein contained.

IV.

Answering that portion of Paragraph VI of said petition commencing with the words "but that" on line 2 of said paragraph, page 4 of said petition, and ending with the words "very substantial" on the last line of said paragraph, appearing on page 4 of said petition, these answering respondents deny, generally and specifically, each and every, all and singular, the allegations therein contained; answering that portion of said Paragraph VI commencing with the words "that such" on the last line of said Paragraph VI, appearing on page 4 of the petition, these answering respondents allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations therein contained, and specifically deny that the offi-

cers and management of petitioner corporation have so managed the affairs and business of petitioner corporation that they became and/or were, either on December 20, 1940 or at any other time, or at all, rehabilitated, sound, businesslike and satisfactory in condition.

V.

Answering Paragraph VII of said petition, these answering respondents allege that they are without knowledge or information sufficient to form a belief as to the truth of the [298] allegations therein contained.

VI.

Answering Paragraph VIII of said petition, these answering respondents deny that the twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of the capital stock of petitioner corporation therein referred to were duly, or otherwise, distributed to petitioner corporation's managing officers pursuant to the terms of said order of March 24, 1936, or pursuant to the, or any, successful rehabilitation of petitioner corporation's affairs; deny that said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock were distributed in express, or any, compliance with said order dated March 24, 1936, and/or the Plan of Reorganization confirmed thereby, and/or in the exercise and/or enforcement of the said order of March 24, 1936; deny that by so distributing said stock to said managing officers petitioner corporation's Board of Directors was enforcing and/or effectuating the authority and/or

direction of said order of March 24, 1936 confirming the Plan of Reorganization, and/or securing and preserving the fruits and advantages thereof, and carrying the same into effect; answering the remaining allegations contained in said Paragraph VIII, these answering respondents allege that they are without knowledge or information sufficient to form a belief as to the truth of said allegations.

VII.

Answering that portion of Paragraph IX of said petition, commencing with the words "that the distribution" appearing on lines 1 and 2 of page 9 of said petition, and ending with the words "dated March 24, 1936" appearing on the last line of said Paragraph IX on page 9 of said petition, these answering respondents allege that the relief sought and prayed for in the Superior Court actions referred to and described in said Paragraph IX [299] was, and is, the same relief hereinafter prayed for by respondents, and, to the extent that the allegations contained in the above mentioned portion of Paragraph IX of said petition were inconsistent therewith, these answering respondents deny, generally and specifically, each and every, all and singular, said allegations.

VIII.

Answering that portion of Paragraph X of said petition, commencing with the words "That the jurisdiction" at the beginning of said paragraph

appearing on page 9 of said petition, and ending with the words "granted thereby" appearing on line 7, page 10 of said petition, these answering respondents deny, generally and specifically, each and every, all and singular, said allegations; deny that by and through the continued prosecution of said Superior Court actions these answering respondents, or either of them, intend to, or will, interfere with and/or defeat the terms, purpose and enforcement of said order of March 24, 1936, or seek to prevent and/or nullify the enforcement and/or effectuation of said order; answering the remaining portions of said Paragraph X, these answering respondents deny, generally and specifically, each and every, all and singular, said allegations.

Answering the Petition Filed Herein By the Above Named Petitioners on March 11, 1941, the above named respondents, Harold M. F. Behneman and Gladys M. Shores, admit, deny and allege as follows:

I.

Answering Paragraph I of said petition, which incorporates by reference all of the allegations contained in the petition filed by petitioners herein on February 19, 1941, the above named respondents incorporate herein by reference all of the al- [300] legations, admissions and denials contained in their foregoing answer to said petition filed herein on February 19, 1941, with the same force and effect as if set forth in full in this paragraph.

II.

Admit each and every, all and singular, the allegations contained in Paragraph II of said petition filed herein on March 11, 1941.

III.

Deny, generally and specifically, each and every, all and singular, the allegations contained in Paragraph III of said petition filed herein on March 11, 1941.

IV.

Answering Paragraph IV of said petition filed herein on March 11, 1941, said respondents deny that the determination of the effect of and/or the enforcement and effectuation of said decree dated March 24, 1936 is within the sole and exclusive jurisdiction and/or the exclusive province of the above entitled court in this proceeding; deny that this is a proper case for the above entitled court to issue in this proceeding its order staying and restraining the now pending State court actions and proceedings referred to and described in said petition filed herein on February 19, 1941 and in said petition filed herein on March 11, 1941, either pending the hearing upon said petitions, or otherwise.

And For a Further, Separate and Distinct Answer to said petitions, and by way of counter claim against the above named petitioners, and each of them, these answering respondents, and each of them, allege as follows: [301]

I.

At all of the times herein mentioned, petitioner Hendy Realization Co. has been, and now is, a corporation, duly organized and existing under and by virtue of the laws of the State of California; prior to on or about December 4, 1940, the name of said corporation was The Joshua Hendy Iron Works, and it is hereinafter sometimes referred to as such; on or about said last mentioned date, said corporate name was, by amendment of the Articles of Incorporation of said company, changed to Hendy Realization Co.; said company will hereinafter, for convenience, sometimes be referred to as the "Hendy Co."

II.

From on or about March 24, 1936 to on or about March 17, 1941, the above named petitioners, Mayman, Moores, Price and Bassick, together with A. E. Webber, continuously were the duly appointed, qualified and acting Directors of the Hendy Co.; from on or about March 24, 1936, and continuously thereafter up to on or about November 15, 1940, the above named petitioners, Bassick, Hyland and Levit, were employees of Hendy Co. and as such were, during said period, fully compensated for services rendered to said corporation; respondents are informed and believe, and therefore allege, that for said period commencing on or about March 24, 1936 and ending on or about November 15, 1940, the said petitioner Bassick was continuously the

duly appointed, qualified and acting President and General Manager of Hendy Co.; respondents are further informed and believe, and therefore allege, that said petitioners Hyland and Levit were not managing officers of said corporation at any time during said last mentioned period.

III.

Respondent Gladys M. Shores is now, and continuously since March 24, 1936 has been, the owner of three hundred three [302] and one-half ($303\frac{1}{2}$) shares of the capital stock of Hendy Co.; respondent Harold M. F. Behneman is now, and continuously since March 24, 1936 has been, the owner of six hundred twenty-two and one-quarter ($622\frac{1}{4}$) shares of the capital stock of Hendy Co.

IV.

On or about March 4, 1935, The Bank of California National Association, a corporation, Moore Dry Dock Company, a corporation, and Baker-Hamilton & Pacific Company, a corporation, as creditors of the Hendy Co., filed a joint petition in the United States District Court for the Northern District of California, Southern Division, for the corporate reorganization of said company under the provisions of Section 77-B of the National Bankruptcy Act; on March 21, 1935, said United States District Court, being satisfied that said petition was properly filed and that the same complied in all respects with the provisions of said Section 77-B of

the Bankruptcy Act, entered its order approving said petition as properly filed under said Section 77-B; the proceedings thus commenced in said United States District Court were entitled "In the Matter of The Joshua Hendy Iron Works, a corporation, Debtor", and were numbered 25937-S in the records of said court.

V.

On September 25, 1935, the above mentioned creditors of the Hendy Co. who filed the original petition for the corporate reorganization of said company, as aforesaid, together with Albertie M. Hendy, a stockholder of said company, filed in said reorganization proceedings a proposed plan for the reorganization of said company; said Plan of Reorganization was thereafter fully and in all respects accepted by creditors and stockholders of the Hendy Co. whose interests were affected thereby, as required by the provisions of said Section 77-B of the Bank- [303] ruptcy Act, and on March 24, 1936, by order duly given and made by Hon. A. F. St. Sure, one of the judges of said United States District Court, said Plan of Reorganization was approved and confirmed, and the Hendy Co., as the debtor in said reorganization proceedings, was authorized, empowered and directed to forthwith reorganize and put into effect and carry out the provisions of said Plan of Reorganization and the orders of said United States District Court relative thereto; on January 27, 1937, a final decree was

entered in this proceeding, in which it was determined by Hon. A. F. St. Sure, one of the judges of the above entitled court, that said Plan of Reorganization had been fully consummated and carried into effect; there was no reservation of jurisdiction provided for in said final decree with respect to any matter involved in said Plan of Reorganization, or with respect to any order of the court pertaining thereto, but, on the contrary, Paragraph 16 of said final decree provided as follows:

“That the proceedings for the corporate reorganization of the debtor in this court, entitled ‘In the Matter of The Joshua Hendy Iron Works, a corporation, Debtor, No. 25937-S’ be, and the same hereby are, terminated and closed, such termination and closing to be for all purposes final upon the filing herein of receipts showing the payment of the final fees and expenses hereinabove allowed, and the surrender and exchange of the stock certificates which have not yet been surrendered and exchanged as provided in said Plan of Reorganization.”

Respondents are informed and believe, and therefore allege, that subsequent to the entry of said final decree on January 27, 1937, no further proceedings of any kind were had or taken herein up to the filing herein by petitioners of their said petition on February 19, 1941.

VI.

At the time of the approval by said United States Dis- [304] trict Court of said Plan of Reorganization, as aforesaid, there were forty-four hundred and twenty-five (4425) shares of the capital stock of the Hendy Co. outstanding, and the said company, as of July 31, 1935, had outstanding obligations, both secured and unsecured, amounting to approximately Six Hundred Twenty-three Thousand One Hundred Seventy and 14/100ths Dollars (\$623,170.14); under the terms of said Plan of Reorganization, said obligations were reduced by from ten per cent (10%) to fifteen per cent (15%), depending upon their classification, and payment of all of said obligations was deferred for a period of five years; the total amount of said obligations, as reduced and deferred under said Plan, amounted to the sum of Five Hundred Forty-nine Thousand Three Hundred Seventeen and 04/100ths Dollars (\$549,317.04).

VII.

Paragraph 6G of said Plan of Reorganization provided as follows:

“G. Capital stock.

4425 shares of the capital stock of the debtor corporation are now outstanding, said shares having a book value of \$212,898.51, but no actual value.

In consideration of the extensions granted by the creditors and of the reduction of their claims in the sum of \$73,853.06, as aforesaid,

the stockholders shall appropriately endorse and deliver the stock held by them to the Board of Directors of the debtor corporation, appointed as hereinafter provided, to be held by said Board as follows:

1. 50% of the shares so deposited by each stockholder shall be held in trust and voted by said Board for a period of 5 years, and thereafter until the extended obligations are fully paid, so as to leave the management of the debtor corporation during such period in the hands of its creditors. The Board shall have full power to vote said stock, including the power to vote for a reorganization of the capital structure of the debtor corporation so as to provide, at any time, for an issue of one or more classes of preferred stock and the exchange therefor of any part or all of the unsecured liabilities of the debtor [305] corporation. Upon the expiration of 5 years and the payment in full of the extended obligations, such shares shall be returned to their respective owners.
2. The remaining 50% of the shares so delivered by each stockholder shall be held by said Board free and clear of any claim, right, title or interest therein by such stockholder, to be distributed by said Board, in its sole discretion, either in

whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company's affairs."

VIII.

Paragraph 8 of said Plan of Reorganization provided in part as follows:

"8. Effect.

While this plan of reorganization will not expunge any of the liabilities of the debtor corporation by transferring them into capital, it will definitely postpone the payment of both principal and interest on prereceivership obligations (excepting from proceeds of assets already allocated as security and therefore not available for working capital) for a sufficiently long period to give the new management an opportunity to resuscitate the debtor corporation, while at the same time the rate of interest is materially reduced. The mere deferment of payment does not, of course, satisfy either principal or interest; but it is manifest that the definite postponement of the payment of all interest and prereceivership liabilities for five years (so that, during such period, the debtor corporation will only be required to pay its current operating expenses, taxes, and the small balance of its receivership accounts), will af-

ford the new management a reasonable opportunity for rehabilitation. If the affairs of the debtor corporation cannot be restored within this period, drastic measures, perhaps even abandonment, will be necessary. If, however, substantial progress is made, any necessary further funding should be readily accomplished.”

IX.

Immediately subsequent to the confirmation of said Plan of Reorganization by the said United States District Court on March 24, 1936, as aforesaid, and pursuant thereto, petitioners Mayman, Moores, Price and Bassick, together with said A. E. Webber, became the Directors of the Hendy Co., and as such became the Voting Trustees of the fifty per cent (50%) of the outstanding [306] stock of said company which was retained by its stockholders under Paragraph 6G 1 of said Plan, and as such Directors and Voting Trustees said petitioners proceeded to carry the said Plan into effect; the affairs of the Hendy Co. were subsequently conducted by, and the business of said company was thereafter continuously managed under the supervision of, said last named petitioners and said A. E. Webber, as such Directors, until on or about March 17, 1941, when a new Board of Directors of petitioner Hendy Co. was elected; petitioner Moores is the only petitioner herein who now is, or since March 17, 1941 has been, a member of the Board of Directors of petitioner Hendy Co.

X.

Prior to, and at the time of, the confirmation of said Plan of Reorganization on March 24, 1936, as aforesaid, respondent Behneman was the owner of twelve hundred forty-four and one-half (1244-1/2) shares of the stock of The Joshua Hendy Iron Works, and respondent Shores was the owner of six hundred seven (607) shares of the stock of The Joshua Hendy Iron Works; subsequent to said confirmation date, and pursuant to the provisions of Paragraph 6G of said Plan of Reorganization, respondents Behneman and Shores deposited their said twelve hundred forty-four and one-half (1244-1/2) shares and six hundred seven (607) shares, respectively, with said petitioners Mayman, Moores, Price and Bassick, together with said A. E. Webber, as the Directors of The Joshua Hendy Iron Works; upon such deposit, there were executed between said respondents and said last named petitioners, in duplicate, Trustees' Receipts and Certificates evidencing ownership by respondent Behneman thereafter of an aggregate of six hundred twenty-two and one-quarter (622-1/4) shares, and ownership by respondent Shores thereafter of an aggregate of three hundred three and one-half (303-1/2) shares, that is to say, fifty per cent (50%) of respondents' said [307] original shareholdings, which shares were thereafter held by said last named petitioners, as such Directors and Trustees, pursuant to the terms of Paragraph 6G 1 of

said Plan of Reorganization and said Trustees' Receipts and Certificates, up to on or about December 20, 1940; the other fifty per cent (50%) of said respondents' said original shareholdings which were deposited with petitioners Mayman, Moores, Price and Bassick, together with said A. E. Webber, as aforesaid, were thereafter held by said last mentioned petitioners, together with said A. E. Webber, as the Directors of the Hendy Co., but nevertheless in trust, pursuant to Paragraph 6G 2 of said Plan, until on or about December 20, 1940, when they were disposed of in the manner described in Paragraph XIII of this separate answer and counter claim.

XI.

On or about November 4, 1940, the Hendy Co. granted an option to MacDonald & Kahn, Inc., a corporation, for the sale of the Hendy Co.'s Sunnyvale, California, plant and equipment, which properties represented the principal and all operating assets of said company; on November 15, 1940, MacDonald & Kahn, Inc. exercised said option and purchased said properties for an amount which respondents are informed and believe, and therefore allege, was slightly in excess of Four Hundred Thousand Dollars (\$400,000), and respondents are further informed and believe, and therefore allege, that said sale has been fully consummated; since its incorporation in 1906 the Hendy Co. has been, and continuously up to on or about November 15, 1940 was, engaged in the general foundry and metal products manufacturing business, with the produc-

tion department of its business being conducted entirely at said Sunnyvale plant; by reason of the sale of said principal and all of the operating assets of the company, i.e., the said Sunnyvale plant and equipment, the continuation of the company in the said business has now been rendered impossible.

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XII.

Since the confirmation of said Plan of Reorganization of the Hendy Co. on March 24, 1936, no dividends have been paid or declared upon any of the outstanding stock of said company, and said company has not, at any time since said last mentioned date, been financially in a condition which would permit of the payment of such dividends; respondents are informed and believe, and therefore allege, that on November 15, 1940, the date of the above mentioned sale of the principal and all operating capital assets of the Hendy Co. to MacDonald & Kahn, Inc., there still remained unpaid more than Two Hundred Thousand Dollars (\$200,000) of the approximate Five Hundred Forty-nine Thousand Three Hundred Seventeen and 04/100ths Dollars (\$549,317.04) of reduced and deferred obligations of the Hendy Co. covered by said Plan of Reorganization; subsequent to November 15, 1940, all of said remaining Two Hundred Thousand Dollars (\$200,000) or more of reduced and deferred obligations covered by said Plan of Reorganization were fully paid, but respondents are informed and believe, and therefore allege, that in order to make

such payment the above named petitioners Mayman, Moores, Price and Bassick, together with said A. E. Webber, as the Directors of the Hendy Co., were forced to, and did, resort to the moneys derived from the said sale of capital assets of the Hendy Co. to MacDonald & Kahn, Inc.

XIII.

Respondents are informed and believe, and therefore allege, that on or about December 20, 1940, and notwithstanding the matters hereinabove alleged in this answer and counter claim, petitioners Mayman, Moores, Price and Bassick, together with A. E. Webber, acting as the Board of Directors of the Hendy Co., and in alleged pursuance of Paragraph 6G 2 of said Plan of Reorganiza- [309] tion of the Hendy Co., proceeded to distribute to petitioners Bassick, Hyland and Levit all of the twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of said company previously held by said Directors under said Paragraph 6G 2 of said Plan, which twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares represent the fifty per cent (50%) of the stock of said company outstanding on March 24, 1936 and surrendered to petitioners Mayman, Moores, Price and Bassick, and said A. E. Webber, as the Directors of the Hendy Co., by respondents and the other then stockholders of said company pursuant to Paragraph 6G of said Plan of Reorganization; said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock were distributed to

said petitioners Bassick, Hyland and Levit in the following proportions, to wit: eight hundred twelve and one-half ($812\frac{1}{2}$) shares thereof were distributed to petitioner Bassick, seven hundred (700) shares thereof were distributed to petitioner Hyland, and seven hundred (700) shares thereof were distributed to petitioner Levit; on or about November 23, 1940, and prior to the distribution of said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares to said last mentioned petitioners, as aforesaid, respondent Behneman notified petitioners Mayman, Moores, Price and Bassick, and said A. E. Webber, as the Directors of the Hendy Co., in writing, that in his opinion the affairs of the Hendy Co. had not been successfully rehabilitated, and requested that he (said respondent) be notified by said Directors in advance of any such stock distribution to managing officers of the Hendy Co. in order that he (said respondent) might take appropriate action to protect his rights and interests; notwithstanding respondent Behneman's said notification and request, and without any prior notification to respondent Behneman, and without any authorization, permission or consent on the part of the [310] above entitled court first had and obtained, said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares were distributed to petitioners Bassick, Hyland and Levit, as managing officers of the Hendy Co., in the manner hereinabove set forth.

XIV.

On or about December 21, 1940, proceedings for the winding up and dissolution of the Hendy Co. were commenced by the adoption of a resolution by the vote of persons allegedly entitled to vote and holding shares representing fifty per cent (50%) or more of the voting power of all of the outstanding capital stock of said company, stating the election of the Hendy Co. and its stockholders to wind up its affairs and voluntarily dissolve; on or about December 21, 1940, notice of the commencement of such dissolution proceedings was mailed by petitioner Mayman, as Secretary of the Hendy Co., to respondents and all other stockholders and Voting Trustees' Receipt and Certificate holders of said company, which said notice was received by respondents on or about December 23, 1940.

XV.

On December 21, 1940, at a duly and regularly called meeting of the Board of Directors of the Hendy Co., petitioners Mayman, Moores, Price and Bassick, together with said A. E. Webber, acting as the Directors of said company, proceeded to terminate the Voting Trust created by Paragraph 6G of said Plan of Reorganization of the Hendy Co. and to declare a first liquidating dividend of Forty-five Dollars (\$45) per share in favor of respondents and the other holders of all of the then outstanding Trustees' Receipts and Certificates of the Hendy Co. issued pursuant to Paragraph 6G 1 of

said Plan of Reorganization; on said last mentioned date there were outstanding Trustees' Receipts and Certificates of the Hendy Co. evidencing ownership of a total of [311] nineteen hundred seven and three-quarters ($1907\text{-}\frac{3}{4}$) shares of the capital stock of said company, three hundred three and one-half ($303\text{-}\frac{1}{2}$) of which then were, and now are, owned by respondent Shores and six hundred twenty-two and one-quarter ($622\text{-}\frac{1}{4}$) of which then were, and now are, owned by respondent Behneman; in declaring said first liquidating dividend of Forty-five Dollars (\$45) per share, as aforesaid, petitioners Mayman, Moores, Price and Bassick, and said A. E. Webber, as the Directors of the Hendy Co., specifically excluded from participation therein the twenty-two hundred twelve and one-half ($2212\text{-}\frac{1}{2}$) shares of stock of said company previously distributed by them to petitioners Bassick, Hyland and Levit, as aforesaid.

XVI.

Petitioners Mayman, Moores, Price and Bassick, together with said A. E. Webber, as the Directors of the Hendy Co. and as individuals, have heretofore contended, and said last named petitioners now contend, that the affairs of said Hendy Co. have been successfully rehabilitated, and in accordance with this contention have distributed to petitioners Bassick, Hyland and Levit, as the purported managing officers of the Hendy Co., said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of the

outstanding stock of said company in alleged pursuance of said Paragraph 6G 2 of said Plan of Reorganization, all as set forth in Paragraph XIII of this counter claim; by reason of such distribution of said stock, all of the individual petitioners have contended, and now contend, that petitioners Bassick, Hyland and Levit, as the owners of said stock, will be entitled to receive future liquidating dividends declared by the Hendy Co. upon an equal pro rata basis with respondents and the other stockholders of the Hendy Co. who, under the provisions of Paragraph 6G of said Plan, were required to surrender said twenty-two hundred [312] twelve and one-half ($22\frac{1}{2}$) shares to petitioners Mayman, Moores, Price and Bassick, and the said A. E. Webber, as aforesaid; petitioner Hendy Co. and the members of its present Board of Directors have threatened to, and will unless restrained by an order of this court, cause future liquidating dividends declared by the Hendy Co. to be paid to said petitioners Bassick, Hyland and Levit, upon said twenty-two hundred twelve and one-half ($22\frac{1}{2}$) shares now collectively held by them, upon an equal pro rata basis with respondents and the other stockholders of the Hendy Co.; respondents are informed and believe, and therefore allege, that there will hereafter be available for distribution by the Hendy Co. to its shareholders, as liquidating dividends, an amount in excess of Sixty Thousand Dollars (\$60,000), more than fifty per cent (50%) of which will be paid by petitioner Hendy Co., through its present

Board of Directors, to petitioners Bassick, Hyland and Levit on said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares now held by them, unless such payment is restrained by an order of this court; respondents contend that the term "successful rehabilitation" as used in Paragraph 6G 2 of said Plan of Reorganization contemplated full payment of the reduced and deferred obligations covered by said Plan out of earnings of the Hendy Co. derived from the operation of its business as a going concern, to the end that the capital assets thereof might be preserved for the benefit of its stockholders, and to the end that the control and management of the affairs of the company as a going concern might be ultimately returned to the said stockholders; that said term "successful rehabilitation" as used in Paragraph 6G 2 of said Plan did not contemplate payment of said reduced and deferred obligations, or any part thereof, out of proceeds of the sale of all operating capital assets and the corporate name and good will of [313] the Hendy Co., followed by a winding up and dissolution of said company.

XVII.

By reason of the facts hereinabove set forth in this answer and counter claim, respondents allege that the affairs of the Hendy Co. have not been successfully, or at all, rehabilitated, and that petitioners Mayman, Moores, Price and Bassick, and said A. E. Webber, as the Directors of said com-

pany, accordingly had no right or discretion in the matter of distributing said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of said company, or any of said shares, to petitioners Bassick, Hyland and Levit, as the purported managing officers of said company, either pursuant to Paragraph 6G 2 of said Plan of Reorganization, or otherwise, and that said share distribution was therefore illegal and void; and respondents, by reason of the facts hereinabove set forth, further allege that petitioner Hendy Co. and its present Board of Directors have no right to cause any liquidating dividends hereafter declared by the Hendy Co. in favor of its stockholders to be paid to said petitioners Bassick, Hyland and Levit on said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares heretofore distributed to, and now collectively held by, them, as aforesaid, but that all such liquidating dividends should be declared only in favor of, and should only be paid to, respondents and the other owners and holders of the nineteen hundred seven and three-quarters ($1907\frac{3}{4}$) shares of Hendy Co. stock which, from March 24, 1936 to December 21, 1940, were subject to the voting trust created by said Plan of Reorganization; an actual controversy has accordingly arisen as to the rights and duties of the parties hereto with respect to: (1) The provisions of Paragraph 6G 2 of said Plan of Reorganization; (2) the title to, and disposition of, the twenty-two hun- [314] dred twelve and one-half ($2212\frac{1}{2}$) shares of stock of said company heretofore

distributed to, and now held by, said petitioners Bassick, Hyland and Levit, as aforesaid; (3) the future distribution of all liquidating dividends hereafter declared by the Hendy Co. in favor of its stockholders.

Wherefore, these answering respondents pray that petitioners' said petitions, filed herein on February 19, 1941 and on March 11, 1941, be dismissed by reason of the lack of jurisdiction of this court over the issues and subject matter raised and referred to by said petitions and by this answer and counter claim; also that the temporary restraining order issued herein on March 11, 1941, and based upon said petitions, be vacated and dissolved.

Or, in the event that jurisdiction over said issues and subject matter is assumed and retained by this court, then, in the alternative, these answering respondents pray as follows:

1. That petitioners take nothing by their said petitions, but that the same be hence dismissed;

2. For a decree declaring and determining the rights and duties of the various parties hereto with respect to each other under Paragraph 6G of said Plan of Reorganization;

3. For a decree declaring and determining the rights and duties of the various parties hereto with respect to the disposition of the twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of the Hendy Co. heretofore distributed to, and now held by, petitioners Bassick, Hyland and Levit under the circumstances hereinabove set forth;

4. For a decree declaring and determining the rights and duties of the various parties hereto with respect to the future distribution of all liquidating dividends hereafter declared by [315] the Hendy Co. to its shareholders, and particularly with reference to whether any such liquidating dividends should be paid on said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of said company heretofore distributed to, and now held by, said petitioners Bassick, Hyland and Levit, as hereinabove set forth, or whether payment of all such future liquidating dividends should be restricted to the nineteen hundred seven and three-quarters ($1907\frac{3}{4}$) shares of stock of the Hendy Co. which, from March 24, 1936 to December 21, 1940, were subject to the Voting Trust created by Paragraph 6G 1 of said Plan of Reorganization;

5. That petitioners Mayman, Moores, Price and Bassick, and each of them, individually and as Directors of the Hendy Co., and their successors in office as Directors of the Hendy Co., and petitioners Bassick, Hyland and Levit, as the present holders of said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of said company, be required to account for all of said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock, as well as for any and all liquidating dividends of the Hendy Co. that may be hereafter declared and/or paid on said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock;

6. That petitioner Hendy Co., and each and all

of the individuals presently constituting the Board of Directors of petitioner Hendy Co., and their successors in office, and their agents, servants, employees, attorneys, and those acting in aid or assistance of them, or any of them, be permanently restrained and enjoined from declaring, or causing to be declared, and from paying, or causing to be paid, from the assets of the Hendy Co. any liquidating or other dividends that may hereafter become due and payable to the stockholders of the Hendy Co., either by reason of the winding up and dissolution of said company, or other- [316] wise, to petitioners Bassick and/or Hyland and/or Levit, or any other present or future holder of the, or any of the, twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock of the Hendy Co. distributed to said last mentioned petitioners by petitioners Mayman, Moores, Price and Bassick, and said A. E. Webber, as the Directors of the Hendy Co., pursuant to Paragraph 6G 2 of said Plan of Reorganization, as hereinabove set forth;

7. That the distribution of said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares to petitioners Bassick, Hyland and Levit, pursuant to Paragraph 6G 2 of said Plan of Reorganization, be declared illegal and void, and that said last mentioned petitioners, and each of them, and/or their successors in interest, or the successor in interest of any of them, be required by an order of this court to surrender to the Hendy Co., any shares of said company now held by them, or any of them, and

which form any part of said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares distributed to said last mentioned petitioners pursuant to Paragraph 6G 2 of said Plan of Reorganization, as hereinabove set forth, and that following such surrender the present Directors of the Hendy Co. be required by an order of this court to return and deliver said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares of stock to respondents and other stockholders of the Hendy Co. who surrendered the same pursuant to Paragraph 6G 2 of said Plan of Reorganization, each of said stockholders to receive out of said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares the exact number thereof so surrendered by each such stockholder; or, if the court think meet and proper, that the present Board of Directors of the Hendy Co. be ordered and directed to cancel all of the certificates evidencing said twenty-two hundred twelve and one-half ($2212\frac{1}{2}$) shares, and to retire the same to the treasury of the Hendy Co.; [317]

8. That these answering respondents be allowed their costs of suit herein, and that said respondents be likewise granted such other and further relief as to the court may seem just, proper and equitable in the premises.

BYRNE, LAMSON & JORDAN
PAUL S. JORDAN

Attorneys for respondents Harold M. F. Behneman
and Gladys M. Shores [318]

State of California,
City and County of San Francisco—ss.

Harold M. F. Behneman, being first duly sworn, deposes and says: That he is one of the respondents named in the foregoing answer; that he has read said answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

HAROLD M. F. BEHNEMAN

(Verification)

(Admission of Service)

[Endorsed]: Filed Apr. 21, 1941. [319]

[Title of District Court and cause—No. 25937-S.]

ANSWER TO COUNTER-CLAIM

Come now Hendy Realization Co., a corporation (formerly The Joshua Hendy Iron Works), debtor, E. M. Hyland, Morris Levit, A. J. Mayman, C. B. Moores, E. H. Price, and W. R. Bassick, petitioners [320] and counter-defendants, and, pursuant to Order of the above entitled court, answering the counter-claim of respondents Harold M. F. Behneman and Gladys M. Shores on file herein, admit, deny, and allege as follows:

I.

Answering the allegations of Paragraph I of said counter-claim, deny that the date of the change of the name of The Joshua Hendy Iron Works to Hendy Realization Co., was on or about December 4, 1940, and in such connection allege that the date of such change of corporate name was December 2, 1940.

II.

Answering the allegations of Paragraph II of said counter-claim, admit that from on or about March 24, 1936, and up to November 15, 1940, petitioners Bassick, Hyland, and Levit were employees of Hendy Realization Co.; and deny generally and specifically, each and every, all and singular, each and every other allegation contained in said Paragraph II. Allege that, by reason of the regular election of their successors in office, petitioners A. J. Mayman, E. H. Price, and W. R. Bassick, on March 17, 1941, ceased to be, and are not now, Directors of Hendy Realization Co.

III.

Petitioners have no information or belief sufficient to enable them to answer the allegations of Paragraph III of said complaint, and basing their denial on that ground deny generally and specifically, each and every, all and singular, said allegations.

IV.

Answering the allegations of Paragraph V of said counter-claim, petitioners admit and allege that

on or about January 27, 1937, the above entitled court duly gave, made, and entered its Order and Decree denominated “Final Decree Approving and Confirming Report of Execution and Accomplishment of Confirmed Plan of [321] Reorganization; * * * etc.,” to which said decree and the terms thereof reference is hereby specially made; and deny generally and specifically, each and every, all and singular, save as so admitted and alleged, each and every allegation contained in said Paragraph V commencing with the word “on” in line 8 on page 8 of said counter-claim and continuing to and including line 29 on page 8 of said counter-claim.

V.

Answering the allegations of Paragraph VI of said counter-claim, deny that under the terms of the plan of reorganization therein referred to the payment of the outstanding obligations of Hendy Realization Co. was deferred for a period of five years.

VI.

Deny generally and specifically, each and every, all and singular, the allegations of Paragraph IX of said counter-claim.

VII.

Answering the allegations of Paragraph X of said counter-claim, petitioners have no information or belief sufficient to enable them to answer the allegation that prior to and at the time of the confirmation of said plan of reorganization on March

24, 1936, respondent Harold M. F. Behneman was the owner of 1244½ shares of the capital stock of The Joshua Hendy Iron Works and/or that respondent Gladys M. Shores was the owner of 607 shares of the capital stock of The Joshua Hendy Iron Works, and, basing their denial upon said ground, deny generally and specifically, each and every, all and singular, said allegations; and deny generally and specifically, each and every, all and singular, each and every other allegation contained in said Paragraph X.

VIII.

Answering the allegations of Paragraph XI of said counter-claim, petitioners deny generally and specifically, each and every, all and singular, the allegations that on November 15, 1940, [322] MacDonald & Kahn, Inc., exercised the option in said Paragraph referred to and purchased the properties in said Paragraph referred to for an amount slightly in excess of \$400,000.00 and/or any other sum and/or that said sale of said properties has been fully consummated to MacDonald & Kahn, Inc., or otherwise, or at all.

IX.

Answering the allegations of Paragraph XII of said counter-claim, petitioners admit that on November 15, 1940, there still remained unpaid more than \$200,000.00 of obligations of Hendy Realization Co. covered by said plan of reorganization, and that subsequent to November 15, 1940, said obligations

were paid; but deny generally and specifically, each and every, all and singular, each and every other allegation contained in said Paragraph XII.

X.

Answering the allegations of Paragraph XIII of said counter-claim petitioners admit and allege that on or about December 20, 1940, the Board of Directors of Hendy Realization Co. duly and regularly distributed 2212½ shares of the capital stock of Hendy Realization Co., pursuant to the terms of the Order of the above entitled court dated March 24, 1936, to the managing officers of Hendy Realization Co., W. R. Bassick, E. M. Hyland, and Morris Levit, in the proportions and in the manner and upon the terms more fully set forth in petitioner's petition for an Order aiding, enforcing, effectuating, and protecting the adjudication, order, and decree of the above entitled court confirming plan of reorganization and directing reorganization of debtor pursuant thereto, and preventing and enjoining the threatened interference with and defeat of said adjudication, order, and decree and the jurisdiction of the above entitled court, the allegations of which said petition are hereby specially referred to and incorporated herein by reference, and that said distribution of 2212½ shares of the capital stock of Hendy Realization Co. was not made otherwise: admit the [323] allegations of Paragraph XIII of said counter-claim commencing with line 18 on page 14 of said counter-claim and to and including line 30

on page 14 of said counter-claim; and, save as herein specially admitted and alleged, deny generally and specifically, each and every, all and singular, each and every other allegation contained in said Paragraph XIII.

XI.

Answering the allegations of Paragraph XIV of said counter-claim, petitioners allege that the proceedings for the winding up and dissolution of Hendy Realization Co. were duly and regularly commenced, taken, and had, and deny generally and specifically, each and every, all and singular, any allegations in said Paragraph XIV inconsistent with this allegation; petitioners have no information or belief sufficient to enable them to answer the allegation as to the date that the notice in said Paragraph referred to was received by respondents, and, basing their denial on said ground, deny said allegation.

XII.

Answering the allegations of Paragraph XV of said counter-claim, petitioners deny that in connection with the termination of the voting trust created by Paragraph 6-G of said plan of reorganization, in said Paragraph referred to, petitioners Mayman, Moores, Price, and Bassick, together with A. E. Webber, were acting as the Directors of Hendy Realization Co., and/or were acting wholly in said capacity; petitioners have no information or belief sufficient to enable them to answer the allegation that 303½ shares of the capital stock of Hendy

Realization Co. were and now are owned by respondent Gladys M. Shores and/or that 622 $\frac{1}{4}$ shares of the capital stock of Hendy Realization Co. were and now are owned by respondent Harold M. F. Behneman, and, basing their denial on said ground, deny generally and specifically, each and every, all and singular, said allegation. [324]

XIII.

Answering the allegations of Paragraph XVI of said counter-claim, petitioners admit that they contend that 2212 $\frac{1}{2}$ shares of the stock of petitioner Hendy Realization Co. were distributed to its managing officers pursuant to the confirmed plan of reorganization as a reward for management and the successful rehabilitation of said corporation's affairs (as more fully in petitioners' petition on file herein set forth), and in such connection allege that said corporation's affairs were at the time of the distribution of said stock successfully rehabilitated; and petitioners deny generally and specifically, each and every, all and singular, each and every other allegation contained in said Paragraph XVI.

XIV.

Deny generally and specifically, each and every, all and singular, the allegations of Paragraph XVII of said counter-claim.

And as and for a second, separate, and further defense and answer to said counter-claim, petitioners allege as follows:

I.

That respondents' said counter-claim fails to state a claim against petitioners, or any of them, upon which relief can be granted.

Wherefore, petitioners, and each of them, pray that respondents, and each of them, take nothing by reason of their said counter-claim; that petitioners, and each of them, be hence dismissed with their costs of suit herein incurred; that petitioners, and each of them, have the Order of the above entitled court and relief prayed in their said petitions on file herein; and for such other and further relief as is meet and proper in the premises.

STANLEY PEDDER and
KENNETH FERGUSON
PILLSBURY, MADISON & SUTRO
LONG & LEVIT

Attorneys for Petitioners. [325]

State of California,
City and County of San Francisco—ss.

Stanley Pedder, being first duly sworn, deposes and says:

That he is an officer, to-wit, the Secretary, of Hendy Realization Co., a corporation, one of the petitions in the above entitled action, and as such is authorized to make this verification on behalf of said corporation; that he has read the foregoing answer to counter-claim and knows the contents thereof; that the same is true of his own knowledge,

except as to such matters therein stated on information or belief, and as to those matters he believes the same to be true.

STANLEY PEDDER

Subscribed and sworn to before me this 2nd day of May, 1941.

[Seal]

ANNE F. SWIFT

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the foregoing Answer to Counter-Claim is hereby acknowledged this 3rd day of May, 1941.

BYRNE, LAMSON & JORDAN

PAUL S. JORDAN

Attorneys for Respondents

[Endorsed]: Filed May 3, 1941. [326]

[Title of District Court and Cause—No. 25937-S.]

CERTIFICATE RELATIVE TO SPECIAL
MASTER'S COMPENSATION AND EXPENSES

To Honorable A. F. St. Sure, United States District
Judge for the Northern District of California:

I. Burton J. Wyman, one of the referees in bankruptcy of this court, heretofore designated special master herein, hereby certify that, in connection with the matters with which the certificate [327] and report filed in the above entitled matter on

March 28, 1941, is concerned, I held two meetings, one on March 12th, and the other on March 18th, 1941, and caused to be prepared said certificate covering 32 pages, of which pages 24 to 30 inclusive, were devoted to a discussion of the law involved. It is my opinion, that for conducting the aforesaid hearings and the preparation of the aforesaid certificate, the sum of \$100.00 is fair and reasonable compensation, and that the sum of \$20.00 is a fair and reasonable amount to be allowed to cover the office and clerical expenses connected therewith.

I therefore respectfully request that in any order that is made in connection with the above entitled matter, provision therein be made for the payment to me by the above entitled debtor, of said sums, or such other sums in lieu thereof, as to the court shall seem meet and proper, and that said amounts be allowed as costs.

Dated: September 26th, 1941.

Respectfully submitted,

BURTON J. WYMAN

Special Master

[Endorsed]: Filed Sept. 26, 1941. [328]

In the Southern Division of the United States
District Court for the Northern District of
California.

Before: Honorable W. A. Beasley, Referee in
Bankruptcy. As Special Master.

No. 25937-S.

In the Matter of

THE JOSHUA HENDY IRON WORKS,
a corporation,

Debtor.

REPORTER'S TRANSCRIPT

(Before Referee)

Tuesday, October 22, 1935. 10 a. m.

Appearances:

G. G. Sanders, Esq., representing the claimant
Carlo Lastreto;

Kenneth R. Ferguson, Esq., and Stanley Ped-
der, Esq., representing W. R. Bassick, Trus-
tee;

R. P. Thornton, Esq., representing H. L. E.
Meyer;

L. D. Byrne, Esq., representing Harold M. F.
Behneman;

Marshall P. Madison, Esq., and Gerald Levin,
Esq., representing creditors Bank of Cali-
fornia, National Association; and Baker-
Hamilton Pacific Company; and Moore Dry
Dock Co.;

Milton T. Farmer, Esq., and Leigh Athearn, Esq., representing John Hedley.

October 22, 1935.

Reported by E. H. Gray.

October 28, 1935.

Reported by Carolyn R. Blair. [329]

Mr. Sanders: We are now presenting petition for an order permitting Carlo Lastreto to file and present a claim. There is an affidavit on file, together with the proposed order. The basis of the affidavit and petition is that Carlo Lastreto was a judgment creditor or a claimant in this matter. He had some two claims against the Debtor. Lastreto levied on what he imagined to be only one claim and obtained thereafter a judgment, and on recovery brought in—or it is now brought out that instead of only obtaining one claim, he levied on and had obtained by sale two claims, and on being set for hearing, it was continued on stipulation in the state court, and he now finds himself in the position where he has filed as judgment creditor on one claim, while he should have filed on two claims; and the original judgment debtor having filed an objection on the ground the present petitioner was holder and owner of both claims, now the claims have been admitted as being filed and it is only a question of who is holding the claim. We have, of course, to admit on the state of the record Lastreto is the holder of both claims, and we are hoping we will be permitted to present and file a claim

on the part of Lastreto for the other \$10,000 claimed which is not filed.

Mr. Ferguson: W. R. Bassick, trustee, is represented by Stanley Pedder and by me, and we want to say there is a claim on the books for \$10,197.50. The claim was filed according to the order of the court by Mr. A. A. Behneman. Prior to that time we had been served with notice that the claim had been sold to Lastreto. We therefore rejected the claim when it was filed on that basis. We are of course not a party in interest.

The Master: Is anybody objecting to the filing of this claim now? I see no reason why that should not be filed. It seems to [330] me the natural thing to do, so the claim will be filed. The order is on my desk and I will sign it.

Mr. Ferguson: There are two matters on before the Court this morning, pursuant to order of general and special reference made to your Honor by Judge St. Sure, September 30, 1935. The first matter is the proposed plan of reorganization of the Debtor Corporation. The second matter is the petition for confirmation of an attorney's fee allowed in the State Court in a prior equity receivership.

The Master: Petition for what?

Mr. Ferguson: Petition for confirmation of authorization, authorizing the trustee to pay a fee which was fixed in the State Court in a prior equity receivership for the attorney for the receiver in that equity receivership. I might say that notice of both hearings has been mailed.

The Master: Is there a trustee?

Mr. Ferguson: There is a trustee in this matter. The first matter is to take up the matter of the fee. The presumption is the fee was fair. First, there is on file in the District Court a certified copy of the order of Judge I. L. Harris fixing a fee of \$3,000, \$500 of which had been paid, and \$2500 remains unpaid. If there is any question, we are ready to put on testimony as to the value of the services, but I presume that unless there is some objection—

The Master: Was any objection made over there?

Mr. Ferguson: It was continued one week. Some preliminary objection which was withdrawn; notice was given to stockholders of the hearing, and I presume there will be no further objection.

The Master: I think if you have testimony as to the value of the services, you better reinforce the position by presenting [331] it, although there may be no active objection here.

STANLEY PEDDER

Called for the Trustee; sworn.

Mr. Ferguson: Q. Mr. Pedder, prior to the institution of this proceeding, Mr. W. R. Bassick was the successor receiver and sole receiver of the Joshua Hendy Iron Works in equity receivership pending in the Superior Court of the City and County of San Francisco? A. He was.

(Testimony of Stanley Pedder.)

Q. And pursuant to the order of that court you were regularly appointed as his attorney?

A. I was.

Q. You acted for him as such attorney from the date of his appointment, or a few days prior in March, the 27th, 1934, to and including March 21st of this year, at which time this proceeding was instituted?

A. That is right, and of course in closing the equity matters, as far as they were closed up.

Q. In that connection, the receiver filed a final account and the matter is now closed, pending a reaching of a plan of reorganization?

A. That is correct.

Q. In connection with the petition of the receiver in the settlement of his account, the receiver set forth the fact that he had received certain compensation for himself pursuant to an order of the court which he made from month to month?

A. That is right.

Q. He further set forth the fact he had paid you \$500, and further asked that such reasonable allowance be made as the court deemed reasonable?

A. Yes.

Q. At that time notice of that hearing was mailed to all the stockholders of the company, and the affidavit or proof of claim is on file?

A. Yes. [332]

Q. A hearing was had before Judge Harris, at which time the largest creditors of the corpora-

(Testimony of Stanley Pedder.)

tion appeared and consented to a fee which was fixed at \$3,000? A. That is right.

Q. And there was a balance of \$2500 still due and payable to you? A. Yes.

Q. At that time some of the largest stockholders wrote in and signified their assent to the compensation? A. Yes.

Q. A certified copy of the decree has been filed in this matter, together with those letters, as suggested by Judge Harris? A. Yes.

Q. In connection with the fixing of that compensation in the matter, you gave certain testimony in regard to services performed by you?

A. Yes.

Q. And you also filed a memorandum, which is not inclusive but which contains an allegation of some of the services rendered? A. Yes.

Q. I ask you whether that is a copy of it?

A. A copy of the memorandum of services rendered by me as attorney for W. R. Bassick.

Mr. Ferguson: If the Court please, we offer that as an exhibit in this proceeding.

Q. That memorandum of services does not cover telephone calls or letters written, but merely conferences?

The Witness: A. That is right, the major things.

Q. And in your opinion, the sum of \$3,000 is a reasonable and fair compensation for your services in that connection?

(Testimony of Stanley Pedder.)

A. I so consider it.

Q. If I would ask you about the individual items, you would testify they are as represented?

A. Yes. May I say for the information of the Court, that that hearing you mentioned that [333] was postponed, there was no criticism whatever of the attorney's fee at all; the carrying over was in connection with the receiver's account upon which certain additional information was desired.

The Master: Unless there is some cross-examination, that will be all.

Mr. Byrne: I have no cross-examination.

The Master: The fee will be confirmed; bring in your order and I will sign it.

Mr. Ferguson: Here it is, your Honor. I presume the Act says the judge will sign it with the usual recommendations in the usual way.

The Master: Yes.

Mr. Ferguson: If the Court please, I realize the trustee is not the protagonist in this reorganization, it is filed by certain stockholders; nevertheless there are certain notices filed, and we ought to have the trustee on the stand.

W. R. BASSICK .

Called for the Trustee; sworn.

Mr. Ferguson: Q. Mr. Bassick, you were appointed temporary trustee of the Joshua Hendy

(Testimony of W. R. Bassick.)

Iron Works, the debtor corporation, under Section 77B, by Judge St. Sure March 21, 1935?

A. That is right.

Q. Prior to that time and from March 27, 1934, you had been receiver of the present debtor corporation in an equity receivership, by the Superior Court for the City of San Francisco?

A. That is right.

Q. Your appointment was made permanent on April 19, 1935 by Judge St. Sure?

A. That is right.

Q. And by order of the District Court you are represented [334] in this proceeding by attorneys, Mr. Pedder and by me? A. Yes.

Q. In that order making that appointment as trustee permanent you were instructed to give notice to all of the creditors and stockholders and other persons having any interest in the estate, by mail, of a time set for the filing of claims, is that correct? A. Yes.

Q. That time set was sixty days?

A. Correct.

Q. And you, in accordance with that order, have caused notice to be mailed to all creditors and stockholders and other persons interested, and also to be published in accordance with the order?

A. Yes.

Q. And the affidavits of proof thereof are on file? A. Correct.

(Testimony of W. R. Bassick.)

Q. In response to this notice, did you or not receive claims of various stockholders and creditors?

A. We did.

Q. Those claims were not a complete representation of the claims as shown by the books, but a substantial amount of persons filed?

A. Substantially so.

Q. In due course you notified those persons whether or not the claims filed by them corresponded with their claims as indicated on the books of the corporation, or not? A. That is right.

Q. Referring to the proposed plan of reorganization of the company which is presently the subject of hearing, when this plan was proposed was it not, by the Bank of California, Baker-Hamilton-Pacific Company and Moore Dry Dock Company,—those are creditors of the company?

A. That is right.

Q. Whose claims arose—a portion of them arose prior to March 27, 1931—May 17, 1932, is that correct? A. That is right.

Q. And it was also proposed by Albertie M. Hendy, who is a stockholder appearing on the records of the company? [335]

A. That is right.

Q. And these creditors, according to the books of the company, represented more than ten percent in amount of all claims against the corporation, and more than twenty percent of several classes?

A. That is right.

(Testimony of W. R. Bassick.)

Q. And Mrs. Hendy owns more than ten percent of the outstanding stock of the debtor corporation? A. That is right.

Q. In reference to the plan so filed, as I understand, you immediately caused the plan to be printed, and applied to the court for a direction as to the manner of mailing notices of the hearing of this plan and this hearing, to all of the various stockholders and creditors of the debtor?

A. That is right.

Q. And Judge St. Sure made his order specially referring this matter to Judge Beasly as Special Master, and also directing the manner in which notice should be given, ten days by mail?

A. That is right.

Q. You thereupon mailed to each of the stockholders, creditors and persons interested in the debtor, as their addresses appeared on the books of the corporation, a copy of the proposed plan of reorganization, together with a notice of hearing, and setting the matter for last Wednesday, and it has been continued to this date, together with notice of hearing upon the petition for confirmation of the fee, which has just been disposed of?

A. That is right.

Q. I show you here an affidavit of mailing, made by S. Ramon. Miss Ramon is employed by you, is she? A. Right.

Q. And she served and mailed these notices pursuant to your request and under your supervision?

A. That is right.

(Testimony of W. R. Bassick.)

Q. Now, if you will examine the affidavit there are two printed notices contained therein and a printed proposed plan of [336] reorganization. Those are the notices and the plan to which you have just referred in your testimony?

A. They are.

Mr. Ferguson: If the Court please, I offer in evidence this affidavit which says that these notices were mailed by regular post more than ten days prior to the time of hearing, to all creditors and stockholders and persons having an interest in the debtor corporation, addressed within the state, and by air mail post to all those persons outside of the state.

The Master: Debtor's Exhibit 1 of October 22, 1935.

Mr. Ferguson: Q. Referring to the proposed plan of reorganization, the figures representing assets and liabilities of the company were taken, were they not, from the debtor corporation's books as of July 31, 1935?

The Witness: A. Correct.

Q. And that was the latest——

The Master: What date did you say?

Mr. Ferguson: July 31, 1935.

Q: That was the latest practical date on which those figures could be taken, was it not, at the time this plan was drawn up? A. Yes.

Q. And those figures were checked, were they not, your figures taken from the books checked by

(Testimony of W. R. Bassick.)

an independent survey made by an independent firm of accountants, Messrs. Bullock & Kellogg?

A. That is right.

Q. In view of the fact that the debtor corporation is continuing to do business under your management, obviously the current liabilities and obligations are constantly fluctuating? A. They are.

Q. And interest upon the obligations prior to the time of the original receivership, May 17, 1932, will be increasing, but [337] substantially these figures as before the receivership will be the substantial figures set forth in this plan? A. They are.

Q. In the notice to the creditors and stockholders, which you mailed pursuant to the order of the court, you have set forth that you would be willing to receive, did you not, such acceptances as may be mailed in by delivery, for delivery by you to the Special Master at the time of hearing?

A. That is right.

Q. Have you received any such acceptances?

A. I have.

Mr. Ferguson: If the Court please, we ought to take these up by classes as set forth in the plan?

The Master: All right.

Mr. Ferguson: Q. The first class set forth in the plan consists of a claim by the United States Government for deficiency in income tax for 1927-1928 in the sum of \$2450.59?

The Witness: A. That is right.

(Testimony of W. R. Bassick.)

Q. And you applied, in accordance with the terms of Section 77B, to the Secretary of the Treasurer's office for an acceptance of the plan?

A. That is right.

Mr. Ferguson: I might say for the Court's guidance, that the plan contemplates that this Government tax claim to be paid in six cash installments, starting one month after the date of the confirmation of the plan, if confirmed.

The Master: Did the Government accept?

Mr. Ferguson: The Government's acceptance is on file in the District Court here, the Government's acceptance being contingent upon the agreement of the security holders as to the amount of the Government's claim and its priority to their claims.

Mr. Madison: That is entirely satisfactory.

Mr. Ferguson: The decree will so provide that condition. I haven't that to introduce, but it has already been filed.

The Master: If it is a record of the Court, I take judicial [338] notice.

Mr. Ferguson: Now, the next class of claims are creditors who hold either bonds or notes secured by bonds of the corporation. I have here the verified acceptance—all acceptances are verified—of the Bank of California, National Association; according to the records of the debtor corporation the Bank of California, National Association holds principal bonds in the sum of \$147,500, together

(Testimony of W. R. Bassick.)

with interest on accrued coupons to July 31, 1935, the date of the plan, of \$139,387.50.

Q. Is that correct?

The Witness: A. Correct.

Q. It holds notes in excess of that amount, but the bank has concluded, subject to confirmation of the plan, to deem the balance of its notes unsecured over and above the amount of security it now holds?

A. That is correct.

Mr. Ferguson: We offer all these together in evidence. This acceptance will cover the other classes of claims too. That, I might say, the bank's claim, in this connection comprises a little better than 94 percent of claims of that class.

Q. Is that correct?

The Witness: A. That is right.

Q. The next class of claims comprises the present deed of trust upon some real property in the City and County of San Francisco, and the bank holds that deed of trust, and this acceptance would cover that class of creditors, 100 percent?

A. That is right.

Q. The next class, certain notes secured by pledge 00 those are held 100 percent by the bank, and its acceptance covers that?

A. That is right.

Q. The next class would be unsecured claims, the bank having [339] set forth against its claim the amount of its security left unsecured to the extent of \$127,956.59?

A. That is right.

(Testimony of W. R. Bassick.)

Q. I also have an acceptance of the plan of reorganization as is in the unsecured class of Baker-Hamilton & Pacific Company. Their claim, as it appears on the books, is \$12,837.64?

A. That is right.

Q. I also have the claim of Morris Levit, the acceptance of Morris Levit. His claim amounts on the books of the debtor corporation, and has been approved by you, to \$3,124.92?

A. That is right.

Q. Also have the claim, verified, of the Moore Dry Dock Company, whose claim upon the books of the debtor corporation is in the sum of \$4,805.60?

A. Correct.

Q. I also have the claim of Stella Ramon, whose claim against the debtor corporation appears, and you have recognized, in the sum of \$562.50?

A. That is right.

Q. When I say "you recognize," you merely recognize that as coinciding with the books of the corporation?

A. That is right.

Q. I also have the claim of A. I. Sillers, \$947.48?

A. Correct.

Q. Also the verified claim of E. M. Hyland, whose claim amounts to \$1382.13?

A. That is correct.

Q. Also the claim of F. L. McAdam, \$648.03?

A. Right.

Q. I also have the claim of J. M. Brown, \$944.87?

A. That is right.

(Testimony of W. R. Bassick.)

Q. I also have the claim of C. B. McAulay, \$1678.75?

A. That is right as shown on my books.

Q. I also have the claim of M. N. Colman, whose claim is shown on the books as \$2851.83?

A. Right.

Q. Now in addition to those verified acceptances, you have received, unverified acceptances from the Sacramento Pipe Works, on their claims of [340] \$787.16, and from T. S. O'Brien, \$806.47?

A. Correct.

Q. You have computed the verified acceptances, including the unverified, with relation to the entire amount of unsecured obligations of the company and you find that the verified acceptances comprise more than two-thirds of this class of claims?

A. That is right.

Q. Approximately 69 percent. Now the next class, or, I might say for the Court's information, that all of the notes and obligations of the debtor corporation since May 17, 1932, the date upon which the receiver was originally appointed in the State equity receivership, have been and will be paid out in the usual course of business is cash, therefore are not affected by the plan. Referring to the claims of stockholders, you have received verified acceptance from various stockholders, have you?

A. Quite a few.

Q. And I will offer these in evidence: Albertie

(Testimony of W. R. Bassick.)

M. Hendy, she is the owner of 609 $\frac{1}{2}$ shares of the capital stock of the debtor company?

A. That is right.

Q. Hazel L. Shattuck, owner, according to the records, of 245 shares of the capital stock?

A. That is right.

Q. Paul W. Shattuck owner of 5 shares?

A. That is right.

Q. Bessie Lutz, owner of 250 shares?

A. Yes.

Q. Charles C. Gardner, executor of the will of Mary F. McGurn, deceased, owner of 861 $\frac{1}{2}$ shares?

A. Correct.

Q. Charles C. Gardner, individually, owner of 125 shares? A. Correct.

Q. Morris Levit, owner of 80 shares?

A. Correct.

Q. E. M. Hyland, owner of 30 shares?

A. Correct.

Q. Samuel J. Hendy, owner of 52 $\frac{3}{4}$ shares?

A. Right.

Q. Gladys M. Shores, owner of 607 shares?

A. Correct. [341]

Q. Mabel H. Webber, owner of 22 shares?

A. Right.

Q. And each of these persons filed claims against you in accordance with the terms of the order?

A. They did.

Q. And the total amount of stock now issued

(Testimony of W. R. Bassick.)

and outstanding, according to the records, is 4,425 shares? A. Correct.

Q. And these verified acceptances cover 2887 $\frac{3}{4}$ shares? A. That is right.

Q. And that is somewhat in excess of 65 percent of the stock, is that correct?

A. That is right.

Mr. Ferguson: If the Court please, we also have here the verified acceptance from Ethel Hendy Cross, 84 $\frac{3}{4}$ shares. We have not included this because no claim was filed against the estate. It was asserted that Mrs. Cross had sold her stock to another claimant who did not file an acceptance, and we have not included this, but we will file it for whatever it is worth.

If the Court please, we offer these acceptances in evidence at this time; they are verified with the exception of two. The Act does not require it—

The Master: I suppose they will identify themselves.

Mr. Ferguson: I suggest they all go in as one except hers.

The Master: Debtor Corporation's Exhibit 2. The other was what?

Mr. Ferguson: Affidavit of mailing. If the Court please, we have a list of all these and would be very happy to introduce it.

The Master: Yes, if you will let me have the list I will put it here, and then that will show what will be included in this.

(Testimony of W. R. Bassick.)

Mr. Ferguson: Q. Mr. Bassick, in connection with the receipt of these acceptances by you, I will ask you whether or not you have exerted any pressure or influence in any way, upon any persons to accept these?[342]

The Witness: A. I should say not.

Q. Has anybody, to your knowledge, exerted any such pressure? A. No.

Q. Most of the acceptances came in unsolicited?

A. Yes.

Q. You have also, as trustee, received a copy of a protest against the plan purported to have been filed by H. L. E. Meyer, Jr., I believe, that formally appears in the record. All we have is the copy served upon us. A. That is right.

Q. Mr. Meyer is owner of \$10,000 principal amount of bonds, upon which there was interest due as of July 31, 1935, in the sum of \$1050?

A. Right.

Q. Mr. Meyer is also an unsecured creditor to the extent of \$7043.77? A. Right.

Q. You have also received a copy of an objection to the plan made in the name of Harold M. F. Behneman? A. Right.

Q. As a stockholder of the corporation, Mr. Behneman, according to the records of the company, owns 1244½ shares of stock of the debtor corporation?

Mr. Byrne: 1244½.

(Testimony of W. R. Bassick.)

The Master: That is common stock?

Mr. Byrne: Incidentally he is the largest stockholder.

Mr. Ferguson: Q. The protest having been made that his stock 1244½ shares stands upon the records of the corporation in the name of F. J. Behneman?

The Witness: Correct.

Q. And F. J. Behneman is deceased at the present time? A. That is right.

Q. The claim has been filed representing that Harold M. F. Behneman is legatee and has had distributed to him these shares. The records show they stand in the name of J. F. Behneman?

A. Correct. [343]

Q. This claim was not filed within the time set by the Court for the filing of claims, it has been subsequently delivered to you, together with the order of the Special Master premitting its filing?

A. That is right.

The Master: Let me have the date when the time expired?

Mr. Ferguson: The time expired on July 19th or 20th of 1935, and this claim was received by the trustee on October 9, 1935.

Mr. Byrne: When was it sworn to?

Mr. Ferguson: It was sworn to on June 18, 1935.

Mr. Byrne: Exactly.

Mr. Ferguson: There was delivered with this an order allowing the claim to be filed—

(Testimony of W. R. Bassick.)

The Master: I recall there was some mistake on the part of the notary. Is there any objection to this claim?

Mr. Byrne: On the ground it was not filed on time.

Mr. Ferguson: The trustee has no objection. He is in no position to object.

The Master: How about the corporation?

Mr. Ferguson: I know of no objection.

The Master: You are representing the debtor corporation?

Mr. Ferguson: Yes, in so far as the trustee has received the powers of management and control.

The Master: Is not the corporation represented here this morning? The corporation is petitioning for reorganization.

Mr. Ferguson: This petition is an involuntary petition on the part of the creditors, if the Court please. The corporation has been in receivership for several years.

The Master: Is the corporation represented here at all this morning?

Mr. Ferguson: Only in so far as one or two of the directors [344] are here individually, that is my understanding.

Q. You also received, as I understand it, Mr. Bassick, a letter from Mrs. Julia Routzahn, who holds a \$6,000 note of the corporation secured by \$8500 principal amount of its bonds, and the interest on her note is \$1105.90 as of July 31, 1935?

(Testimony of W. R. Bassick.)

Mrs. Routzahn having some question as to the proposed plan, as I understand it, you wrote her advising her that because of official capacity you would be unable to present formally any objection or questions she might have, and heard nothing further from her?

The Witness: That is right.

Q. Mr. Bassick, have you the plan of reorganization before you? I am going to ask certain preliminary questions as a ground for any objections.

The Master: Proceed in your own way.

Mr. Ferguson: Q. I am calling your attention to Exhibit "A" particularly, which purports to be a balance sheet of the debtor corporation as of date July 31, 1935.

The Master: That is Exhibit "A" on page 10 of the proposed plan?

Mr. Ferguson: 10 and 11, assets on page 10 and liabilities on page 11.

Q. Do you find that page 10, Mr. Bassick?

The Witness: A. Yes.

Q. Which balance sheet purports to have been made, and which you have testified was made, from the books of the debtor corporation. I will ask you whether or not you, as trustee, have made any change upon the books of the corporation with respect to the book value of the fixed assets of the corporation? A. I have not. [345]

Q. The value of the debtor's fixed assets as the same appear on the books of the corporation are as those in Exhibit "A"?

(Testimony of W. R. Bassick.)

A. That is right.

Q. Are purely a book value of the assets which are carried by the debtor corporation, and are not the appraised value? A. Right.

Q. And you have not applied to the Court as yet for authority to rewrite these assets, but have continued the books as you found them, save you properly entered items since your trusteeship?

A. That is right.

Q. I appreciate that you have not made a detailed approximation of the capital assets of the debtor corporation, but, as I understand it, you are sufficiently familiar, through your management of the debtor corporation, to state in a general way whether or not the book values as shown on this exhibit are approximately correct; is that right?

A. I think so.

The Master: Q. These are approximately correct?

The Witness: A. The book values?

Q. Yes. A. No, I would not say they are.

Q. I did not understand the answer to the question.

Mr. Ferguson: The answer to the question is "No."

Q. Would you say, generally speaking, from your familiarity with the business of the corporation you have been running two years or so, whether in your opinion the book values were high or low? A. I would say they are high.

(Testimony of W. R. Bassick.)

Q. Can you say what, in your opinion, in a general way, would be the actual value of these assets with the corporation as a going concern?

A. I should say about fifty percent.

Q. Have you any opinion of what the value of these assets might be on a liquidated basis?

A. I would not want to place [346] any dollars and cents value, but I would say it would be very much less, substantially.

Q. On what would you base your opinion?

A. As a going concern. Machinery, for example, in place has a value, and the buildings are of value as a going concern, but the land and buildings have very little value if the company is not operating.

The Master: You mean if the property was liquidated it would bring very much less. They asked you what the actual value of the assets are as a going concern?

The Witness: A. Very much less.

Q. The assets consist of what?

A. Machinery, buildings, inventory, and there is an orchard, a pear orchard.

Q. How much land have you?

A. Thirty acres.

Q. Mortgaged?

Mr. Ferguson: It is a bond issue.

The Master: The bond issue covers land and also the plant?

Mr. Ferguson: Covers substantially the whole.

The Master: Generally speaking, the assets con-

(Testimony of W. R. Bassick.)

sist of the land; how many acres, 22? About 30 acres of land and buildings on the land, and the machinery in the buildings and some merchandise or material?

The Witness: A. Inventory merchandise.

Q. Inventory of what?

A. Raw materials and finished materials.

Mr. Ferguson: Q. The corporation has been running a great many years, is that correct?

The Witness: A. That is right.

Q. And is much of the machinery old or new?

A. The machinery is very old.

Q. And has value as a going concern but not much salvage value? A. Correct. [347]

The Master: Q. What has its business been principally?

The Witness: A. Mining.

Q. Mining machinery?

A. Mining machinery, and special machinery.

Q. Just as a matter of curiosity, I presume that the business ought to look up if the mining business continues to improve?

A. We have been operating at a small profit since about June of last year.

The Master: Don't let me interrupt you, Mr. Ferguson.

Mr. Ferguson: Q. With respect to the period of your management, up until July 31, 1935, at the figures contained in the plan can you state whether or not the operations of the debtor corporation have

(Testimony of W. R. Bassick.)

resulted in a profit or in a loss through your trusteeship?

The Witness: A. Been operated at a profit.

Q. Does that include or not include adequate depreciation and interest upon—

A. When I say “profit” I mean operating profit, which does not include depreciation or interest on the obligations prior to the receivership.

Q. So when you say “operating profit,” you mean currently its position is profitable, but you cannot take care of fixed charges on the old obligations? A. Not yet.

The Master: Is that operating profit before taxes and insurance?

The Witness: A. No, it includes taxes and insurance.

Mr. Ferguson: Q. Can you state in your opinion whether or not the amount of the profit, which you say is a small profit, would be sufficient to carry on the present obligations of the debtor corporation, including depreciation and interest on pre-receivership obligations?

A. Up to the date of the report of July 31, 1935, no. [348]

Q. By that I mean, taking into consideration all the present obligations of the company, is the small profit sufficient to carry those present obligations?

A. No, it is not.

Q. Now you have examined the provisions of the proposed plan of reorganization. Have you prepared

(Testimony of W. R. Bassick.)

a detailed showing of the charges which must be met during the next five years of the proposed reorganization? A. Yes, it has been prepared.

Q. This is the table which you prepared?

A. It is.

Mr. Ferguson: If the Court please, I offer this just by way of explanation and amplification of the plan.

The Master: Debtor's Exhibit 3.

Mr. Ferguson: Examining this table I find that the Class B obligations, all these obligations added together would contemplate meeting fixed charges during the first five years if the plan went into effect, of \$10,988.46 in the first three years, \$23,902.46 in the fourth year, and \$26,647.85 in the fifth year, is that correct?

A. Of course we have to recognize the fact that it is pretty hard to predict the future. Based on what we have accomplished and what has been accomplished since I went in as receiver, for example, I would say that it could easily be met.

Q. In this connection I call the Court's attention to the fact that none of the items of fixed charges are payable except either out of the proceeds of the sale of the property or interest bearing security, or unless earned. So, it is your opinion, Mr. Bassick, that given reasonable business earnings and proper management and operating revenue of the debtor corporation, you will be able to meet these

(Testimony of W. R. Bassick.)

fixed charges. It is your opinion. You cannot predict the future, but it is your opinion?

A. Based on all the evidence we have at the present time, I would say "yes." [349]

Q. From your familiarity with the condition of the debtor corporation, is it your opinion that the debtor corporation would or would not, if this proposed plan is put into effect, be afforded some opportunity of getting back on its feet?

A. I feel so.

Q. Would you care to amplify your answer in any particular?

A. I would be glad to answer any special question.

Q. Now the plan shows that there is as of July 31, 1935, something in excess of \$500,000 worth of obligations over and above current obligations. Have you any estimate or opinion as to how long, under the proposed plan, it might be necessary to run in order to work off that plan? Do you think that it could be done in five years?

Mr. Byrne: A five-year plan, is it?

Mr. Ferguson: A five year plan.

Q. Do you think it could be done in five years Mr. Bassick?

The Witness: A. There is a reasonable chance of accomplishing it in five years. This plan that was evolved was worked out after a great deal of thought and consideration with every care, and thought, being given to all classes of creditors and stockholders, and it seems to be the most practical

(Testimony of W. R. Bassick.)

plan that can be worked out, having in mind all those considerations.

Q. Can you give us some indication as to what the current position of the company is in connection with carrying out its current business; are you able to do that out of your own financing or your own general strength, or what is the situation?

A. Of course the company has been in a very fortunate position in that one of the principal creditors has supplied the working capital that the company needed to carry on its business. We have no working capital, we have succeeded in reducing current [350] obligations and we are now working on a thirty-sixty day basis. I think most accounts are paid up within sixty days.

Q. As I understand the bulk of the larger business you now have would be impossible without some outside financing?

A. It would be, especially with the size of the contracts we have on our hands at the present time. It would *not possible* without outside assistance.

Mr. Ferguson: That is all we have now, if the Court please.

The Master: Do any of you gentlemen want to cross-examine?

Mr. Byrne: I wish to file at this time a formal objection. I have been furnished by counsel with a copy of the stockholder plan, and I think if your Honor will look at that and also at the proposed plan, on G-2, I think it would not require a great

(Testimony of W. R. Bassick.)

deal of argument to show that the plan is absolutely illegal and unjustified by law, and there are some matters I want to ask the witness now.

Mr. Norton: May I ask the witness one question?

Q. Are you acquainted with what the liquidation value would be at the present time of that Sunnyvale property and all the machinery and other items covered by the deed of trust securing the bond issue?

The Witness: A. I have not made any figures for liquidating value of the property, but I might say to you that I have had twenty-five years of experience in manufacturing of every kind; there is a big difference between liquidating value and a going business. As a going business, the inventory and tools, fixtures, are a very important part of the business. In liquidating that don't mean anything except to that particular business. Take a big 16-foot planer or mill we have there, with a very expensive foundation; that foundation is an asset when it is a going business. [351] When you come to sell that business, it is a liability because it has to be disposed of. It is a detriment to the property. In my judgment there is no market at all for that property except as a going business. The best interests of everybody would be served by keeping it as a going business.

Mr. Norton: My idea, my client insisted that the property was worth a half million dollars, which would be quite a bit larger than the amount of

(Testimony of W. R. Bassick.)

bonds outstanding. I was wondering how much less than half a million—

A. As a going business it is my best judgment it is not worth anywhere near that. As located at present it would be worth \$100,000.

Mr. Madison: Q. Turning to Exhibit “A”, where are the lands covered by the deed of trust and other property? Does that come into the item “Sunnyvale plant?” A. Sunnyvale plant.

Q. \$17,000 is the book value?

A. Yes, the value that was left on the books.

Q. Now, the buildings—is that \$102,000?

A. That is \$102,000, yes, nearly \$103,000.

Q. Is that covered by deed of trust?

A. It is.

Q. Now the machinery, tools and fixtures, \$443,000: a portion of this I understand was covered, and a portion was not, is that correct?

A. I think practically all are covered.

Q. All covered by this deed of trust?

A. Yes.

Q. And do I understand it is your opinion that in that property there is no other property in this balance sheet that is covered?

Mr. Pedder: Patents, patterns and drawings I think are mentioned on the balance sheet?

A. I am afraid I cannot answer that question, Mr. Madison; I don't know. [352]

Mr. Pedder: Q. Is it your impression that the trustee refers to the then existing patents?

(Testimony of W. R. Bassick.)

Mr. Byrne: I do. I don't think the general creditors have been advised of the situation at all. When I get around to it, I will ask some questions.

Mr. Madison: Q. Do I understand you believe that if all of that property that has been referred to as being covered by deed of trust was sold at the present time and within say ninety days from the present time, that you would have difficulty in realizing \$100,000?

The Witness: A. I doubt if you could sell it at all. There is a plant next door that has been there five years that is still vacant.

The Master: What plant?

The Witness: A. The old Gardner, then it became a canning company, canning machinery. Now it is marked "Sunnyvale Distillery."

Q. Across the railroad?

A. No, across the lot on the same side of the street.

Q. Is that an old machinery company plant?

A. Yes.

Q. That has been there thirty years?

A. Yes, and it has been vacant for a number of years. I cannot tell you just how many.

Mr. Madison: I have no further questions.

The Master: I wish you would take this matter up one at a time, so I can keep track of your evidence better that way.

Mr. Norton: I want to ask one more question.

(Testimony of W. R. Bassick.)

The Master: Perhaps he wishes to ask one question and then be excused.

Mr. Madison: May I explain that Mr. Norton represents Mr. Meyer who is one of the contestants and who is urging a certain [353] line of testimony which deals with this particular property. Mr. Byrne is inquiring from another angle, and my question was to follow up Mr. Norton's question. I think possibly Mr. Norton has one more question.

Mr. Norton: I just want an explanation, that is all that is required, of this very large interest item that the Bank of California is putting in of \$139,000, where the principal is \$147,000. That would seem coupons has not been cut for about twenty years, is that the fact? Have coupons not been paid on that loan for twenty years?

Mr. Madison: I cannot advise you as to the length of time, but for the purpose of the record, Mr. Meyer, whom Mr. Norton represents, has been getting his coupons paid, but the Bank, being in the position which it has of supplying this corporation with capital, has not been receiving its interest or having coupons paid, those have been accumulating, for what period of time, I do not know, but that is a correct question.

Mr. Norton: I want to understand if *there* coupons upon those bonds or if it is interest on their loan?

The Witness: A. That is right.

(Testimony of W. R. Bassick.)

Cross-Examination

The Master: You are directing your objection to what particular part of the—

Mr. Byrne: I want to clear up one point here.

The Master: Is there some part of the plan?

Mr. Byrne: Yes, it is directed to G-2, that is of the plan itself. I want to ask one question which I think should be cleared up before I proceed. This is the question:

Q. Mr. Bassick, you stated that this present bond issue—I think this is very important, your Honor, because as stockholder [354] I don't feel—I feel that the general creditors here have not been advised of the situation, and I think they should be. I do not know if Mr. Bassick knows about it; perhaps he does not.

Q. Mr. Bassick, you stated a while ago that this bond issue—that the Bank of California holds a great number of these bonds. You said a while ago that bond issue secured the plant and practically all the equipment; is that your statement?

The Witness: A. Yes.

Q. Are you familiar with the bond indenture?

A. Not entirely.

The Master: Wouldn't the bond indenture be the best evidence? Couldn't you and I make up our minds as to what it covers?

Mr. Byrne: I think so.

The Master: Have you a copy?

Mr. Madison: Not here.

(Testimony of W. R. Bassick.)

Mr. Byrne: Q. Do you know when that bond indenture was put on, approximately how many years ago?

The Witness: A. No, I don't remember.

Q. A great many years?

A. I have seen it, but I don't remember.

Q. Do you know how much equipment, tools, has been added down at your plant since that bond indenture was put on?

A. No, I do not.

Q. You don't know that that bond indenture does not cover future and after-placed property on the premises, do you? A. No.

Mr. Byrne: Now that is the point I think should be cleared up. I think in justice to these general creditors, as I read that bond indenture it was made a great, great many years ago, long before the War, and in 1914 the plant was practically rebuilt, all the machinery was put out and new equipment was put in, and this bond indenture does not cover after-acquired property. It covered the [355] then existing plant and then machinery, and I don't think that these creditors, general creditors, are advised of that fact, and I think in justice to them they should be advised. If they want then to o. k. the plan, all well and good, but I think light should be thrown on the question. There is a lot down on North Beach which the Bank has a deed of trust on, a portion of it and not on the other, and the impression is given by the plan they owned all the

(Testimony of W. R. Bassick.)

security. At the present time there is a big portion of that lot that is free and unincumbered.

Mr. Madison: It is a very small portion.

Mr. Byrne: It is a very vital question, but especially the plant account. We, representing stockholders, think they should be advised of these facts. Now Mr. Bassick himself does not know and yet here is a plan that is presented, and is there light given to these men? Naturally you take the plan to a lot of general creditors and they see the interest the Bank of California has therein, and what can we do? We must take what we can get: That is the way the plan looks, and I think they should be advised.

The Master: You can see it would not be out of place to have a copy of the bond indenture here, and while this witness is on the stand we can determine what it does cover.

Mr. Pedder: I suggest if it be true, and of course it is if Mr. Byrne says so, he has been connected with the company a long time, that this plant may have been added to and subtracted from in the last twenty years, that the bond issue would give us no basis of making a distinction of the different items.

The Master: Mr. Byrne's contention is that the bond indenture has no provision in it covering after-acquired property. His contention is, under those circumstances the rebuilt plant would not be covered by the bond issue. We cannot very well deter-

(Testimony of W. R. Bassick.)

mine unless [356] we have the bond indenture here before us, and then if necessary it will be necessary to have somebody acquainted with the plant or property tell us what property may be within the terms of the deed securing the property.

Mr. Byrne: I think general creditors ought to know whether or not they want to go along with this plan or whether they want to liquidate and get what they can. There is the North Beach lot, a portion of it, there may be a considerable part of the plant available to these creditors.

The Master: The only way we can do is to take the trust deed or mortgage and fit it to the property and find out what property is covered by it. That is, that has not been disclosed.

Mr. Byrne: I have no objection to the general plan. All I think is that light ought to be given, and I think these people ought to be apprised of their rights and what the situation is, and I don't think they have been.

Mr. Madison: If I may say this: We have, representing the Bank of California and such other creditors as we represent, naturally no objection at all to complete light being thrown on this matter. And, if the Court please, if proper notice has not been given, an opportunity for the creditors to come in and represent themselves, why any notice that the Court might ask or any reports circulated among the creditors could be done. Of course, as I understand, Mr. Byrne comes and files a petition, based

(Testimony of W. R. Bassick.)

upon the language of the Act, so far as creditors are concerned, on the unconstitutionality of the Act, and as far as I know represents no creditors. Now the plan speaks for itself. No matter what the deed of trust covers, there is no suggestion in the plan that the Bank obtained a greater security than it has now under the new situation. So if the Bank's security is of [357] now, it will be of no value under the new plan. It is a preferred creditor to a certain extent, because it has some security even under Mr. Byrne's view of the deed of trust. That is about all I have to say. I am perfectly willing to submit to your Honor either one or both of two things: if there are any general creditors, or, if your Honor please, after testimony given any additional information should be desired by any general creditors, we are perfectly willing it may be given and will do anything you feel is fair and reasonable. At the same time, it seems what we are really interested in is what Mr. Byrne is objecting to.

Mr. Byrne: There is a statement made which I do not think was correct, and in all fairness to the Court should be straightened out, I think you should have the trust indenture. You must have a copy of it.

Mr. Madison: I do not doubt there is one in our files.

Mr. Byrne: I have one.

The Master: This matter was not before me heretofore. The usual procedure taken is to have

(Testimony of W. R. Bassick.)

the notice which was given of the hearing, supervised by the Court or by a Master and to see at that time that all the information is given that is considered important, and it is correctly given. Now, in this case, I don't know whether I want to undertake something a District Judge may have had submitted to him, or not. I don't think I would want to hear you on a constitutional objection.

Mr. Byrne: It is not a constitutional objection necessarily. I want to ask, as a preliminary basis—of course my objection is this, before I ask these questions: this plan in G-2, if your Honor will read it, contemplates that the stockholders shall give up fifty percent of their stock, not into the treasury, not in any [358] way modifying their rights, but to be given to the board of directors, to be given by the board of directors, say, to other parties, when and if that board of directors decides that they are entitled for some reason as a reward for rehabilitation of the company's affairs. I believe that the Act itself provides that the rights of stockholders may be modified by giving either securities or otherwise; the rights of stockholders may be modified, but that does not put the stamp of approval upon a plan which takes the stock away from one and gives it to another. That is not modifying the rights of stockholders, because the rights of stockholders if the stock is in the hands of new holders, is not modified. That is not within the contemplation of this Act at all. Furthermore they say to give it to

(Testimony of W. R. Bassick.)

the board of directors to give away as they please for the successful rehabilitation of the company's affairs. All right, what does that mean? I asked Mr. Pedder, who is attorney here, I said "Does that mean when it is on a dividend paying basis? Does that mean when the debts are paid? Is that a condition?" He said, "Oh, no, that is to give it away at any stage that they want to." We say that there is no consideration for such a plan, that it is not within the meaning of 77B and if it were it would be taking away one's property without due process of law. There is no consideration whatever given for it. I want to ask a few questions of Mr. Bassick in relation to these claims.

Q. Mr. Bassick, it is a fact, is it not, that the largest stockholder is Doctor A. Behneman, whom I am representing, is that true?

The Witness: A. I believe so.

Q. And the only other large stockholder is the Estate of McGurn and Mrs. Anne Hendy, is that correct? [359]

The Witness: A. Mrs. Shores.

Q. How many shares. A. 607.

Q. Mrs. Hendy transferred to Mrs. Shores, and Mrs. Shores is Mrs. Hendy's daughter-in-law?

A. Daughter.

Q. All right. Now, Mr. Gardner, purports here, as executor, to give his consent, does he not, as executor of the estate of Mrs. McGurn. Do you know how Mr. Gardner happened to give that consent?

(Testimony of W. R. Bassick.)

A. No, I am not familiar with it.

Q. Did you ever discuss it with Mr. Gardner?

A. No.

Q. How did you receive it?

A. It came by mail.

Q. From Mr. Gardner? A. Yes.

Q. Do you know that the Estate of McGurn is in probate? A. No.

Q. You don't know that. Do you know whether or not there is any permission of the Probate Court for this executor to sign this contemplated plan to give away fifty percent of the assets of the Estate of McGurn, any probate order?

A. No, I don't know that.

Q. Did you know this McGurn stock is pledged to the Bank of California, did you know that?

A. No.

Q. You did not know that? A. No.

Mr. Byrne: Have you any probate order?

Mr. Ferguson: We can get an order.

Mr. Byrne: Do you think you can?

Mr. Ferguson: I do not represent Mr. Gardner.

Mr. Byrne: Do you know how Mr. Gardner's claim came in?

Mr. Ferguson: He mailed it into our office.

Mr. Byrne: You think he did?

Mr. Ferguson: I know he did.

Mr. Byrne: Do you know whether or not the Bank of California put any pressure on Mr. Gardner? [360]

(Testimony of W. R. Bassick.)

Mr. Ferguson: I don't know.

Mr. Byrne: I can state to your Honor that Mr. Gardner came into my office three days before and told me he would not sign it but he was afraid of the Bank of California.

The Master: That would have to be proved. Let me ask you this: is his consent necessary to make up the necessary percentage?

Mr. Byrne: Yes it is, your Honor.

Mr. Ferguson: I don't know.

Mr. Byrne: The consent of the McGurn Estate, and that is in probate.

Mr. Ferguson: Without his consent I think there is about 49 percent. With his consent there is 65½ percent.

The Master: You are supposed to have 66 percent.

Mr. Ferguson: No, only fifty percent.

The Master: You have 49 percent without it?

Mr. Ferguson: I think approximately 49 percent, and with his claim approximately 65½; not including this consent, there may be some question as to her consent, but Mrs. Cross owns some shares. There was a claim filed showing that stock may have been transferred to somebody else.

Mr. Byrne: Do you know who it may have been transferred to?

Mr. Ferguson: A. L. Behneman filed claim.

Mr. Byrne: Yes, A. L. Behneman.

Q. Now, Mrs. Hendy, who got her consent?

(Testimony of W. R. Bassick.)

The Witness: A. What do you mean by getting consent?

Q. Who went to Mrs. A. M. Hendy and got her consent? A. I did.

Q. And who got her consent? She filed no other claim did she, no other consent was filed other than the approval to the plan?

A. She filed a formal verified acceptance, yes. [361]

Q. You went and solicited Mrs. Hendy?

A. I did not. I explained the plan to Mrs. Hendy and told her I thought it was the best plan that could be worked out for the benefit of all parties concerned. It was entirely optional with her whether she did or did not sign.

Q. What did you tell her about the stockholders giving up fifty percent of their stock to be given to the new officers of the company; did you discuss that fact with her?

A. Yes, I read the whole plan to her paragraph by paragraph.

Q. What did she say to that?

A. She said—at first she objected to it and then she thought it was all right.

Mr. Ferguson: If the Court please—

Mr. Byrne: Please do not interrupt me.

Mr. Ferguson: We represent Mr. Bassick.

Mr. Byrne: You can wait until I get through. As I understand procedure I am supposed to be cross-examining.

(Testimony of W. R. Bassick.)

Mr. Ferguson: We have a right to urge upon the court our objections. I am attempting to urge on the court—I don't want there to be any confusion—there is a verified acceptance on file by Mrs. Handy.

Mr. Byrne: Are you arguing or making an objection to my question?

Mr. Ferguson: I am trying to urge an objection to the court. My objection is simply this: I do not think it is pertinent that this line of testimony be gone into, unless Mr. Byrne is attempting to show that Mrs. Hendy's signature to any proposed plan, or her acceptance was got by some sort of coercion, duress or fraud. Otherwise this whole line of testimony is a waste of time.

Mr. Byrne: Here is Mr. Bassick, in charge of this company, and apparently is the man that is going to continue and reap the [362] benefit of this stock, fifty percent of the stock being given up. He is the man who solicited Mrs. Hendy; it didn't come from these debtors, or unsecured creditors, or anybody else.

Mr. Ferguson: I resent the aspersions cast upon the trustee. More particularly I resent the statement unless there is some proof offered that Mr. Bassick intends to get fifty percent of the stock.

Mr. Byrne: I am going to ask him.

The Master: Proceed and ask the questions and I will rule on the objections.

(Testimony of W. R. Bassick.)

Mr. Byrne: Q. Mrs. Hendy is quite an old woman?

The Witness: A. She was all right the day I talked to her.

Q. Was she all right? Is she not suffering from a very severe heart ailment?

A. I don't think that she was.

The Master: May I ask a question at this point? What is the name of this stockholder who is dead?

Mr. Byrne: F. J. Behneman.

Mr. Ferguson: That is the one Mr. Byrne represents. Does your Honor refer to the one whose acceptance had been delivered here?

The Master: This probate matter.

Mr. Byrne: Estate of Mary F. McGurn.

The Master: Let me have the name of the dead man—Mary F. McGurn is dead?

Mr. Byrne: She is dead, and Charles C. Gardner, is her executor.

The Master: Who has signed the consent?

Mr. Byrne: Charles C. Gardner, executor of the Estate of McGurn. There is no consent of the Probate Court to give away fifty percent of the assets. [363]

The Master: I don't think there is any proof yet. There is no consent given by the court; I don't know if that is necessary. I am not sure that it is necessary for the proponent here to prove any necessity other than the consent of the executor. I imagine it would be presumed he had a proper order, if it was necessary.

(Testimony of W. R. Bassick.)

Mr. Byrne: If there is any question about that—I take this position: I am positive that there had been none. Mr. Gardner came into my office a few days ago and thought it was very questionable that stockholders were called upon to give away stock, and says “I am helpless, because the bank holds an indebtedness of my mother.”

The Master: Once and for all, I think that is the difficulty right along, that people do not regard me exactly as a Court. I am ruling on this as a matter of evidence. Mr. Byrne’s statement is no doubt true, and I would take his statement on anything, but I am a Special Master and as such I am a judicial officer, and his statement makes no impression on me as a judicial officer.

Mr. Madison: I assume that, but I suggest your Honor makes a ruling on the matter so we could pass it.

The Master: I am not ready to rule on this question, or the necessity for a consent here or for an order of court. I don’t know I would be ready to say an order of court would be sufficient. I am all at sea on the question.

Mr. Byrne: The reason I made that statement, your Honor, I did not expect it to be introduced in evidence nor your Honor to regard it as anything more than a mere statement on my part. I meant to say this: I knew that to be the fact and if it were vital then I would have Mr. Gardner here to testify under what circumstances he gave this consent, if

(Testimony of W. R. Bassick.)

it were vital. But I don't think your Honor thinks it is, because I don't think that under [364] 77B of this Bankruptcy Act, I don't think that 99 percent of the stockholders have any right to take away one shares from one single stockholder and give it to another person. I think the Act is very clear, 77B of the Bankruptcy Act says "to modify the rights of stockholders." You do not modify the rights of stockholders by taking out of their pockets and putting into the pockets of anybody else. Furthermore, there is no condition upon which these people are to get this stock, at what stage of the game. I said to Mr. Pedder that we would have no objection to surrendering 50 percent of our stock to the treasury, or giving 50 percent providing it was a condition that this new adjustment would pay the debts, or whenever they would pay even the unsecured creditors, but to just turn it over *carte blanche* to a board of directors—

The Master: In a matter of this kind, has the Bankruptcy Court authority in response to a plan of this kind that is consented to by a sufficient number of stockholders, to wipe out some of the stock? I am speaking of common stock certificates. We have the right to do that.

Mr. Byrne: To make them surrender?

The Master: Yes, cancel it.

Mr. Byrne: I am rather inclined to think it could be canceled.

(Testimony of W. R. Bassick.)

The Master: Why cannot the court approve the use of it for the purpose of securing a competent management and paying the managers, instead of money, paying them by delivering stock to them?

Mr. Byrne: Because that is not modifying the rights of stockholders.

The Master: You think it is not?

Mr. Byrne: No, because when the new stockholders get this stock, the rights of stockholders are not modified. What it means then, this Act means you can take and give them some other form [365] of security, or if they had preferred stock, you could cut down the rights of that preferred stock as to participation or voting rights.

The Master: You could issue common stock instead of preferred stock?

Mr. Byrne: Exactly. That is as I take it.

The Master: You could issue common stock instead of preferred stock. Would that not be taking some interest in the business away?

Mr. Byrne: Sure, but that is modifying the security itself for the betterment of the company, but that is an entirely different thing than taking away the stock of the stockholders and giving it to somebody else.

The Master: You concede they could take it away absolutely, that is, to just wipe it out?

Mr. Byrne: But for the benefit—that would simply mean that they took away fifty percent and decreased the capital fifty percent that would go to

(Testimony of W. R. Bassick.)

help the corporation; that would be modifications of its rights.

The Master: They could turn over some stock of the company to bondholders in compensation for their giving up certain rights, or doing certain things.

Mr. Byrne: I doubt that very much. I think you could first cancel it and then perhaps you could issue a certain amount of stock as bonuses or give it to preferred stock creditors.

Mr. Madison: What do you mean by "cancel?"

Mr. Byrne: I think you could reduce the outstanding stock by canceling fifty percent under reorganization plan, that is modification of stockholders' rights. That means what? That means modification of the security.

Mr. Madison: When they turn in their stock to the corporation—I don't understand what you mean by "cancel", whether certificates [366] are canceled or coupons changed.

Mr. Byrne: I think you reduce capital by fifty percent.

Mr. Ferguson: If they get all the stock, it makes no difference.

Mr. Byrne: It says "modify the rights of stockholders."

Mr. Pedder: I will read it: "may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any char-

(Testimony of W. R. Bassick.)

acter or otherwise.” And, moreover, there is also a provision in regard to the acceptance and approval of the plan: “Providing, however, That such acceptance shall not be requisite to the confirmation of the plan by any stockholder or class of stockholders (1) if the judge shall have determined either that the debtor is insolvent, or that the interests of such stockholder or stockholders will not be affected by the plan,” etc. “or if provision is made in the plan for the protection of the interests of such stockholder or stockholders,” etc.

The Master: It is conceded here that this corporation is insolvent?

Mr. Pedder: Absolutely insolvent.

The Master: Everybody present concedes the insolvency?

Mr. Pedder: Absolutely “busted.”

Mr. Byrne: I think it is “busted.”

The Master: I do not see that the stockholder is losing anything if he is giving up fifty percent of the stock and fifty percent is used Mr. Byrne, you will have your exception on it. I think it is not necessary to discuss it further.

Mr. Byrne: I have nothing further.

The Master: The objection is overruled. Now you may proceed with some other phase of this matter.

Mr. Norton: I have an objection on behalf of one of the secured [367] creditors.

The Master: Who is the secured creditor?

Mr. Norton: H. L. E. Meyers, Jr. My client

(Testimony of W. R. Bassick.)

bases his objection upon the assumption that he had previously—that the security back of the bonds that he held was ample to cover the bonds. From the testimony we have heard this morning, if that is the fact, I do not doubt my client would be willing to take something less, but he does feel that inasmuch as the security was, he thought, and it was represented to him as being, ample to cover all the bonds held by the creditors in Class B as set up by the plan, he thought he should not accept anything less than payment in full in the amount of his claim. Considering the fact further that the Bank of California is the principal secured—the sole secured claimant in Classes C and D, and in this class they are provided for to a very much more satisfactory extent, if they are permitted to realize upon their security during the next five years, if it can be done, and also their principal is not knocked down as much as ours in Class B, so it seems as if the sacrifice that our claimant is asked to make is merely for the purpose of permitting the Bank of California to realize more on its other secured claims and unsecured claims, and considering it from that light and the light that my client is owner of the bonds, while the other members of the same class are holders of the bonds as security, H. L. E. Meyers feels that he should receive full consideration of his principal and interest in any plan that is agreed to by the creditors.

Mr. Madison: May I answer that: we represent

(Testimony of W. R. Bassick.)

the Bank of California, which seems to be the subject of the discussion. The class to which Mr. Norton refers is Class B. Mr. Meyers is interested in that class to the extent of \$11,050. We are *interest*, the Bank of California in that class, to the extent of \$286,000. [368]

The Master: What is that now?

Mr. Madison: Mr. Meyers claims \$11,000; the Bank of California claims \$286,000.

The Master: That is in Class——

Mr. Madison: Class B.

The Master: And the bank's claim?

Mr. Madison: \$286,000 and Mr. Meyers' is \$11,000. It is perfectly obvious that Mr. Meyers is entitled to representation of his claim in full. He expects payment in full—I assume you mean 5-year securities, because nobody has any money to pay any claims.

Mr. Norton: I appreciate that, but my client's idea was that he could get paid in full.

Mr. Madison: Notwithstanding no other creditor is to be paid? Mr. Norton: Yes.

Mr. Madison: I submit, your Honor, that is impossible. Now, as far as Mr. Meyers' getting 100 percent of the amount of his claim because it is secured by these bonds, it is natural if your Honor were to make any such ruling as that, you would have to give the Bank of California 100 percent in its class, all of that class would have to be treated alike. The fact that the bank does not hold title to

(Testimony of W. R. Bassick.)

the bonds, it does hold the bonds in pledge, which is not being attacked as pledge holder, it is in the same position as a bona fide holder and is therefore in the same position as Mr. Meyers.

As to the statement of Mr. Meyers' losing \$1,000 on his claim is going to make it appear if the bank could collect its claims in Classes C and D, we are sacrificing ten percent of that claim in Class B, \$286,000. The claim in C is only eighty; D is less than \$7500, so you can see it would be hardly practical to sacrifice our [369] claim in B to make it appear to collect 100 percent in C and D. Furthermore we are also being scaled down. As far as the bank is concerned, we would not care if you raised Mr. Meyers \$5,000, you will raise our \$286,000, so obviously it is to our interest to have our claim—but we feel a general scaling down of these debts applicable to all creditors is very much in the interest of the company and very much to the interest of unsecured creditors of which Mr. Meyers is one.

Mr. Norton: I might add the other two securities in C and D, there is a provision that the Bank of California may realize on them before the five years are up, while Class B in which Mr. Meyers is put, the proposition is to issue a new note with no default possible for five years, and also interest may be paid in scrip. It seems to me his treatment is not so good in that respect.

Mr. Madison: The bank is in the same position as you are, \$286,000 against \$11,000.

(Testimony of W. R. Bassick.)

Mr. Norton: Yes, but they retain their full security claimed in the other two classes.

Mr. Madison: Which is about half of the total amount we are sacrificing in those classes.

Mr. Pedder: The sole provision is that they can only be paid principal and interest if that security is sold. If it is sold for less than the amount of these claims the differential drops down with the unsecured class. If, however, that security should be sold for more than the amount of claims in those classes, the excess is not retained by the bank to apply on any other indebtedness, but goes into the general working funds of the corporation, I believe a fair proposition.

Mr. Madison: So far as these properties are concerned, there is a distinct difference. The property secured under Class B is the very heart of the business, it is the plant at Sunnyvale, its [370] operating stock, machinery—in spite of Mr. Byrne's statement to the contrary, under Class C the property is not operating property, practically unimproved property that the corporation has been trying to sell for some time; the first chance a good opportunity comes to sell it. The plan contemplates the continued operation of the business. Obviously they don't want to have a similar provision under Class B, it would mean that the plant could be sold. That is the reason for the designation of those two classes.

Mr. Athearn: We would like to have it appear in

(Testimony of W. R. Bassick.)

the record that we are attorneys for Mr. John Hedley, in Class E. We are appearing here and urging a further investigation to be made into the liquidation value and the fixed assets of the corporation. His claim is small, is not as great, but he would be interested, say, if the assets were sold, paying a small dividend to the unsecured creditors, particularly in view of the questions asked by Mr. Norton regarding sale value of the properties, and the question of the amount of security now held by the Bank of California as brought out by Mr. Byrne.

The Master: What is the amount of Hedley's claim?

Mr. Athearn: \$630.

The Master: What is the basis of it?

Mr. Athearn: The claim falls in Class E under the plan of reorganization.

Mr. Norton: I want to say if the trustees care to give us evidence as to the actual value or liquidation value of the property now covered by the security for those bonds, we will be glad to take it up with our client. I think the value is actually much less than the security which he thought he had—which had been represented to him.

The Master: I could reach that by an expensive procedure, to send [371] appraisers down there and appraise this plant. It seems to me some fair minded person outside of the interested parties might be in this, to look that matter over and give some idea as to what chance there would be to dispose of it.

(Discussion off the record.)

(Testimony of W. R. Bassick.)

All those things have to be thought out by you gentlemen. I can not consider them, but they will be considered by you. As to this wage claim here, I am very sympathetic with a man who had kept at work a long time, who never gets his money. This matter will have to be taken up later. It is now twelve o'clock. I have the Fairmont matter on this afternoon and it has to go on, and I want to keep other matters out of the way. I do not think Mr. Bryne's question is serious, although I think he considers it is, because he expects a showing on it, I can tell by his attitude. As to this other question, the consent of the Probate Court, we are all advised of it and will apparently learn something. I very much imagine you can get that approval without trouble if you take it up there, because it is so obviously important with the executor; he used his own judgment. I think the judge will not put his judgment in the place of the executor in a thing of that kind; he will say it has been the right thing to do and will probably follow the idea of the executor.

Mr. Ferguson: I have no doubt we can get the order.

Mr. Pedder: Regarding the Hedley matter, you are sympathetic to a wage claimant, and of course we all are. On the present status of this matter, it is a wage claim that has nothing to do with the receiver or the prior receiver.

(Testimony of W. R. Bassick.)

Mr. Ferguson: Mr. Athearn was apprised that the United States Government acceptance of the plan is contingent upon the fact that no claim will be paid until it is paid in full. None of the claims [372] affected by the plan will be paid until the United States is paid.

The Master: These unsecured creditors are unsecured, that is not my fault, but the unsecured creditors are given unsecured five-year notes for 85 percent of their claims.

Mr. Norton: May I point out my client also has an unsecured claim. He is not really objecting to the plan as far as unsecured claims go, but there is a provision that the stockholders may change any unsecured claims they want, which might be the case hereafter, they might relegate some secured claims to some other position.

Mr. Pedder: That can only be done with the consent of the creditor.

Mr. Norton: But if that is true—

The Master: The court has the option of changing it.

Mr. Pedder: We hope at some future time if the rehabilitation goes on. It is not part of the plan.

The Master: Have we the authority to force a creditor to take the preferred stock; is that your understanding?

Mr. Norton: If that is true as he says, there is no objection.

The Master: Now, gentlemen, I think you better

(Testimony of W. R. Bassick.)

get your consent from the judge over there that probate matter, and I think in addition to that that there should be some independent evidence of the value of this plant so these gentlemen may satisfy themselves as to what their chances are if there is to be a liquidation. Is an action pending in the Superior Court to foreclose this mortgage?

Mr. Pedder: No, sir, it has not started.

The Master: What is the basis of the receivership?

Mr. Ferguson: Stockholders' suit.

Mr. Madison: If I might point out, the claims of these two gentlemen are conflicting, Mr. Norton is contending the value of [373] the property is higher, whereas the other gentlemen is contending it is lower.

The Master: They have a right to be inconsistent with each other.

Mr. Madison: We are contending different things entirely. I just want to see what you want.

The Master: A fair estimate of the value of that. I do not doubt the estimate of the trustee. I think for this record you should have a fair estimate of the value. I could name somebody, but I do not want to do so or he will expect a fee. He could go down and take a week or more and charge ten dollars a day, and the result would be that much more expense. It seems to me somebody ought to have him come here and subject himself to cross-examination

(Testimony of W. R. Bassick.)

so they can convince their clients as to the value of the plant. I doubt if it is of much value. If I were a lawyer facing this matter, I would be very slow to accept the idea that is worth much down there. That other plant, when it was built, was first-class thirty years ago. It has been standing there and they never have been able to dispose of it for anything. These plants, when they are reorganized, or when they are sold in liquidation, they are found to be in the position where some person is interested and he can force the hand of everybody else and can purchase it.

Mr. Pedder: The difficulty I see is in advising Mr. Bassick how such kind of an appraisement of the property should be made. That is comparatively simple, but if we try to take the next step to show which part is applicable to the security of the bonds and which is not——

The Master: I think that should be expounded for the objection Mr. Byrne made. Mr. Bassick ought to be able to point out the property that is covered.

Mr. Norton: It is very material to our objection. [374]

Mr. Pedder: The trouble is I have not made a careful study of the deed of trust. My recollection is there was no detailed list of machinery and equipment attached to it, so you would be up against the question of when it was bought and installed.

The Master: Do the best you can.

(Testimony of W. R. Bassick.)

Mr. Madison: It does not strike me, in spite of what Mr. Byrne says, it is at all material, for the reason that the bond creditors are going to get no more than they have now, according to what the plan provides, as long as we don't take more than they had before.

The Master: If a good part of the plant was not covered by the bond indenture, they would be getting more.

Mr. Pedder: No, it specifically provides in the plan that the Class B Notes shall be secured by a first lien upon the same property as is now secured by the bonds. There has been no attempt to have anything different. Same with the Bay-Kearny property. It may not be expressed so explicitly, but there is nothing to be read but that the Bank of California shall have the same security, no intention of shifting.

The Master: You will have to argue that before the Judge when the matter goes over there. All I can do is to recommend. The first question the Judge will ask you is "What is the value of all this property?" Some value should be placed on it. I can take the value of the trustee. There will be immediate objection by Mr. Byrne that the trustee is an interested party. As I say, I will not send an appraiser down there. I will leave it to you gentlemen to get some testimony.

The Witness: May I interrupt? With regard to Mr. Meyers he had several thousand dollars on the books of the company when I went in there; that

(Testimony of W. R. Bassick.)

has all been paid. In addition to that, this company has got thousands of dollars from Mr. Meyers, and it is decidedly [375] to his advantage to have some plan go through that will keep the business going. There is no chance of keeping that place going unless it has a plan that can be met. The business not only has to be rehabilitated so far as financial structure is concerned, but as far as the property is concern^t, the continued improving of it, putting on roofs. The buildings were built in 1906. Some of those machines were put in as late as that date.

The Master: Well, Mr. Meyers' attorney expresses the idea his client will be reasonable; it seems if those matters are fully explained we probably will have no difficulty in getting him to agree.

Mr. Ferguson: It is possible there will be no necessity for a further hearing.

Mr. Pedder: I think your Honor's suggestion about the appraisal will probably meet our minds on these matters.

The Witness: Would you want the value taken as liquidating value, or going concern?

The Master: What I am interested in hearing is what is its liquidation value, because I have to decide whether it is fair to the bondholders and other creditors to continue this matter as a going concern; if it is of such a nature that it will still have enough to pay their claims off—of course it is not fair to take any part of their claims away. They are entitled to all.

(Continued to Monday, October 28, 10 a.m.) [376]

Monday, October 28, 1935.

Appearances:

Kenneth Ferguson, Esq., for the Trustee;

Leigh Athearn, Esq., for John Hedley, a
creditor;

R. P. Norton, Esq., for Objecting Creditor,
Meyer.

Mr. Ferguson: If the Court please, you will recall this is a proceeding under Section 77-B. A hearing was had last Tuesday, on the 22nd and continued to this time to clear up certain remaining matters. I have a couple of preliminary matters. The Court will recall in connection with one of the acceptances, it had been filed and approved by an executor of an estate. The Court indicated it might be better to have that certified by an order of the probate Court, certifying the acceptance and we offer that in Court. We introduced a great number of acceptances and indicated we would be glad to file a statement or group them, showing the total percentages in each case that accept the plan. That is in excess, the Court will notice, of the percentages provided by Section 77 B in each instance.

The Master: I did not mark this as an exhibit. It is simply a statement for my use in the matter and in evidence.

Mr. Ferguson: In this connection, the Court may also recall that a protest had been filed on behalf of one of the bondholders. Mr. Norton who represents the bondholder, I think, is ready to advise the Court that is withdrawn. Is that correct?

Mr. Norton: I understand it has been, although I understand you are going to put on evidence as to value.

Mr. Ferguson: That is correct, yes.

The Master: This is Mr. Meyers' objection?

Mr. Ferguson: Yes. [377]

Mr. Ferguson: Mr. Smiley, will you take the stand, please? The Court may also recall the last time it was indicated it might be desirable in this proceeding to elicit some independent testimony with respect to the value of the plant at Sunnyvale.

JOHN A. SMILEY,

Called for the Trustee, Sworn.

Mr. Ferguson: Q. Where do you reside?

A. 1183 Holman Road, Oakland.

Q. And what is your occupation?

A. I am a mechanical and electrical engineer.

Q. And will you state briefly for the Court the nature and extent of your experience and qualifications in connection with your occupation? I take it, it will be satisfactory to the Court to refresh your recollection from the memorandum prepared by you.

A. In 1906 I was graduated from the University of Nevada School of Mechanical and Electrical Engineering with a Bachelor of Science degree.

The Master: You may state the qualifications generally. There will be no contest about it.

The Witness: A. After that I went with the

(Testimony of John A. Smiley.)

Atlas Engine Works at Indianapolis, Indiana and served in their erection shops, also on the road in special sales work. Then I came to San Francisco to the Henshaw people for two or three years, selling machinery for them. For four or five years after that, I was in selling work generally with Charles C. Moore, Pacific Gas & Electric Company, Ford, Bacon & Davis, Sanderson & Porter. In 1916 I made an appraisal of the rolling stock and overhead construction work for the Market Street Railway. In 1918 to 1922 I was purchasing agent for Pacific Coast Ship Building Company in Chicago and San [378] Francisco. In 1923 I made an appraisal of the Coast Valleys Gas & Electric Company's distribution and transmission system. From 1923 to 1924 I was purchasing agent for the Steel Tank & Pipe Company.

The Master: I think he has shown his qualifications.

Mr. Ferguson: All right.

Q. You are not regularly employed or intermittently employed by The Joshua Hendy Iron Works, are you? A. I am not.

Q. Or Mr. Bassick, the trustee? A. No.

Q. You are not related to any of the parties involved in this proceeding? A. No, I am not.

Q. You have no interest other than as an independent investigator, the independent investigation such as you have made? A. That is all.

(Testimony of John A. Smiley.)

Q. Mr. Smiley, I realize, of course, you have had a very few days to examine the plant at Sunnyvale, but have you been able in that time to arrive at some estimate of the value of the Sunnyvale properties or plant of The Joshua Hendy Iron Works?

A. Yes, I have. In my own estimation, I have formed an opinion about what the property is worth.

Q. Now, looking at the value of these properties, first, as of their value to the debtor as a going concern. Have you arrived at any value of the property as a going concern? A. I have.

Q. Will you state briefly to the Court what you find the value to be, in your opinion?

A. The value on historical basis, less depreciation at the present time, \$295,000.

Q. In round figures?

A. In round figures, yes.

Q. Did you also check that computation by an appraisal of the [379] values of the properties as a going concern on any other basis?

A. Yes, I took the same figures and worked them up on a reproduction cost basis and depreciated them and arrived at a figure of \$228,000. That was only to check the reasonableness of my first figure.

Q. Now, those figures are estimates by you of the value as a going concern, of those assets, to the debtor, are they? A. Yes.

(Testimony of John A. Smiley.)

Q. Would the same figures represent their value, the value of the assets, if the plant was to be broken up and sold at the present time? A. No.

Q. And have you made any estimate of the break-up value or liquidation value of those assets?

A. Yes; I arrived at a value of \$92,000. That is the Sunnyvale plant only, not San Francisco.

Q. We understand. You have prepared a rough recapitulation, showing the items attributed by you to each of the book entry items, to the building, land, and so forth, the check-up of those figures, have you not? A. Yes, I have.

Mr. Ferguson: If the Court please, that is being typed up and I will be able to present that in a few minutes, to substantiate the testimony. It is his copy of the working figures in that regard.

The Witness: A. That is right.

Mr. Ferguson: Any further questions, if the Court please?

The Master: I think I have no questions.

Mr. Norton: Q. I was just wondering whether it will require a great outlay to put the plant in working condition. Is it much run down?

The Witness: A. Well, if you were going to build that plant now, [380] today, the machinery is old-style machinery and one thing particularly I noticed. Most of this machinery was belt-driven. If you were going to build, probably you would put in motor-drives in all those tools.

(Testimony of John A. Smiley.)

Q. And you base that \$92,000 valuation upon what you thought the machinery, that old-style machinery as it stands there now in the plant, would fetch, being sold piece-meal?

A. Yes. That includes the land also.

Q. And the land and building? A. Yes.

The Master: Q. How much land did you say is there?

The Witness: I left it at the figure they have on the books; \$17,180.

Q. How many acres?

A. Thirty-three acres.

The Master: I think that is about right. I think they paid \$500 an acre for the Sunnyvale site for the Zeppelins, didn't they?

A. I don't know what they paid.

The Master: That is my impression. Generally, I have knowledge of the value of land down there. However, my knowledge is not evidence. I should imagine that would be just about what that land is worth if it were bare land in position to be planted to something or used for agricultural purposes. Mr. Athearn, any questions?

Mr. Athearn: No questions.

Mr. Ferguson: That is all on behalf of the trustee, if the Court please and I believe that concludes all the matters we have before your Honor in connection with this plant except Mr. Athearn's suggestion. In that particular Mr. Athearn, you will

recall, represents Mr. Hedley, who has filed a claim prior to the original receivership in the sum of \$600. As Mr. Athearn [381] stated to the Court the last time, all he would like to do is realize something for this unfortunate gentleman if he possibly could, but unfortunately, as we explained, that is impossible. The Government has a tax claim for some \$2500 plus interest. The condition of its acceptance of the plan is the condition that no claims be paid until that is paid. In addition, I may point out, as of this unsecured indebtedness prior to receivership, there is about \$26,000 in deferred wages and salaries, represented on the books of the company and of that class, Mr. Hedley is one.

The Master: How do you expect to treat those obligations?

Mr. Ferguson: Those obligations, if the Court please, under the plan, are provided to be classed with unsecured creditors with unsecured five-year notes, bearing no interest whatever. You must understand these wage claims arose more than three years ago, prior to the time the debtor corporation was originally placed in the state receivership and the bulk of these people have accepted the plan proposed. Of course, there is nothing to pay at the present time. Only if the matter works itself out under some such plan as here presented will they have an opportunity to realize on their claims.

The Master: You are now in position, the jurisdictional notices are in shape and everything so you are presenting the plan for confirmation?

Mr. Ferguson: Correct, if the Court please. Notice has been given. Now, the only question is whether your Honor in these matters presents a certificate or report to the District Court or whether you would prefer to have the whole proceeding in a form of order and use the same form you have been using and make your recommendation? [382]

The Master: I think that is the better way to do and I want to examine the plan myself independently after you have it in shape so I can look at it. I will take it up and endeavor to look at it in a couple of days. Mr. Athearn, have you any comment about the claim you represent?

Mr. Athearn: Your Honor, we were trying to obtain a purchaser for the note. They don't seem available, inasmuch as the liquidation value will leave nothing for unsecured creditors. There is no choice for us.

The Master: I think that is true. I don't know how the matter will come out. Nobody can forecast it. I will look at the plan, however, so that I can answer any question if the judge before whom the matter finally goes wants to ask questions. In fact, in drawing the report, I will try to anticipate any questions that might arise in the judge's mind. It will take a couple of days. Meanwhile, there is nothing to do but mark the case submitted, is there?

Mr. Ferguson: I would be glad to leave a couple of more copies of the plan for your Honor.

The Master: Two copies are enough.

Mr. Ferguson: I understand that you will be in touch with this in a couple of days. Perhaps, meantime, I might be of some assistance in drafting the proposed form of order confirming the plan and submitting it to you?

The Master: Yes. I will talk to you when I have had a chance to examine the plan. [383]

Before: Honorable Burton J. Wyman, Special Master.

Monday, December 30th, 1935. 2 P. M.

Appearances:

Kenneth R. Ferguson, Esq. and Stanley Peder, Esq., Attorneys for W. R. Bassick, Trustee;

L. D. Byrne, Esq., Attorney for Harold M. F. Behneman;

Marshall P. Madison, Esq. and Gerald Levin, Esq., Attorneys for the Bank of California;

Charles C. Gardner, In propria persona;

Paul W. Shattuck;

C. B. Moores;

W. R. Bassick, the trustee.

Mr. Ferguson: If the Court please, I would like to make a preliminary statement for the purpose of the record. The matter which is now before the Court is a specially limited hearing upon two questions in connection with the proposed plan of re-

organization on file by The Joshua Hendy Iron Works. It will be remembered that the plan of reorganization came on regularly for hearing, after being noticed to be held on October 16, 1935, hearings were continued to October 22, 1935 and further to October 28, 1935, those hearings being held before Judge W. A. Beasly as special master. On the last date, October 28, 1935, the plan of reorganization was submitted to Judge Beasly; unfortunately, before he was able to make his report in the matter, Judge Beasly died. On November 29, 1935 Judge Burton J. Wyman was appointed and is now sitting as special master for the hearing of this plan of reorganization. Pursuant to Judge Wyman's directions, the reporter prepared a transcript of the hearings which had been held before Judge Beasly upon a plan of reorganization and after having examined the plan, that is, after Judge Wyman had examined [386] the plan as special master, he advised me, together with Mr. Pedder as attorneys for Mr. Basick, the trustee, that he desired further limited hearing upon two points; that is, upon two contentions which had been advanced by Mr. Byrne, attorney for Harold M. F. Behneman, a stockholder, at the hearing held on October 22, 1935, these points being, as Mr. Byrne contends, that Mr. Charles C. Gardner accepted the plan of reorganization as executor of the estate of Mary McGurn because of pressure that had been put upon him by the Bank of California, and that contention of Mr.

Byrne's is on transcript pages 32 and following. And, secondly, Mr. Byrne's contention that Paragraph G of the proposed plan of reorganization relating to treatment of stockholders, does not modify or alter the rights of stockholders within the purview of Section 77 B of the Bankruptcy Act, and the reporter's transcript of that contention and Judge Beasley's ruling in connection therewith appears on pages 37 and following of the reporter's transcript. In accordance with the special master's request, we, as attorneys for the trustee, immediately notified, that is, on December 16th and 17th, notified the following parties of this further limited hearing. That is, we notified Mr. Byrne as attorney for Mr. Harold M. F. Behneman, Charles C. Gardner personally, also Mr. Bert Levit, who heretofore in connection with proceedings heretofore appeared as attorney for Mr. Gardner; Pillsbury, Madison & Sutro, attorneys for the original petitioning creditors, for the reorganization of the debtor, and they are also attorneys for the creditors who filed the plan, who with Mrs. Hendy, one stockholder, filed the plan and also the Bank of California, who is the principal creditor in every class. Also, of course, we notified the trustee and, incidentally, notified Mr. Paul Shattuck, who as we understand, is [387] acquainted with the situation. I do not believe any formal proof of this notification is necessary, if the Court please, because all of these parties are here in response to the hearing. I do not think there will

be any question that we notified them at that time. We also notified each of these parties, in accordance with the direction of the Court and of the special master, that the hearing which would be held today would be strictly limited to the two questions which I have mentioned and which were given to us by the special master; and, further, that the special master desired any argument which was addressed to the special master upon the second of the two questions, that is, in regard to Section G of the plan, to be supported and supplemented by a written memorandum of points and authorities by the parties who submit the argument. With that preliminary statement, I think, if the Court please, the record will be complete.

The Master: You may proceed. We will take up Mr. Gardner's connection with the matter.

Mr. Ferguson: Of course, if the Court please, we represent the trustee and are largely non-partisan in the matter, but since someone must take the laboring oar, I suppose, I will be glad to act. Mr. Gardner, will you take the stand?

CHARLES C. GARDNER,

Sworn.

The Master: Q. Where do you live?

A. Alameda.

Q. What address, please?

A. 2017 Central Avenue.

Mr. Ferguson: Q. Mr. Gardner, you are a stock-

(Testimony of Charles C. Gardner.)

holder of the debtor corporation, The Joshua Hendy Iron Works, in your own individual ownership?

A. Yes. [388]

Q. And, as I understand it, you are also the executor of the estate of Sarah McGurn, deceased?

A. Mary F. McGurn.

Q. She was your mother? A. Yes.

Q. The estate of Mary F. McGurn, as I understand, has as its sole asset, has it not, stock of the debtor corporation? A. Correct.

Q. You have filed in this proceeding your verified acceptances of the plan of reorganization, both individually and as executor of the estate of Mary F. McGurn? A. Yes.

Q. And your acceptance of the plan, filed on behalf of the estate of Mary F. McGurn, is supported by an order of the Superior Court of Alameda County, authorizing you to sign that acceptance? A. Yes, sir.

Q. Mr. Gardner, as I understand it, you were not present at the prior hearing that has been held in connection with this plan of reorganization?

A. No.

Q. On the occasion of the prior hearings, particularly the hearing held October 22, 1935, Mr. Leo Byrne, representing Harold M. F. Behneman, a stockholder, asked on direct examination—on cross-examination of Mr. Basick, the following question: “Do you know whether or not the Bank of Cali-

(Testimony of Charles C. Gardner.)

ifornia put any pressure on Mr. Gardner?" I am reading from page 32 of the record, if the Court please.

"Mr. Ferguson: I don't know.

"Mr. Byrne: I can state to your Honor that Mr. Gardner came into my office three days before and told me he would not sign it but he was afraid of the Bank of California."

The Master says:

"That would have to be proved. Let me ask you this: Is his consent necessary to make up the necessary [389] percentage?

"Mr. Byrne: Yes, it is, your Honor.

"Mr. Ferguson: I don't know.

"Mr. Byrne: The consent of the McGurn Estate, and that is in probate.

"Mr. Ferguson: Without his consent I think there is about 49 per cent. With his consent there is 65½ per cent.

"The Master: You are supposed to have 66 per cent.

"Mr. Ferguson: No, only fifty per cent.

"The Master: You have 49 per cent without it?

"Mr. Ferguson: I think approximately 49 per cent, and with his claim approximately 65½; not including this consent, there may be some question as to her consent, but Mrs. Cross owns some shares. There was a claim filed showing

(Testimony of Charles C. Gardner.)

that stock may have been transferred to somebody else.”

Then, continuing on page 35 and following, the following statements appear as having transpired at the hearing:

“Mr. Byrne: “Estate of Mary F. McGurn.

“The Master. Let me have the name of the dead man—Mary F. McGurn is dead?

“Mr. Byrne: She is dead and Charles C. Gardner is her executor.

“The Master: Who has signed the consent?

“Mr. Byrne: Charles C. Gardner, executor of the Estate of McGurn. There is no consent of the Probate Court to give away fifty per cent of the assets.”

That is the end of the quotation in that connection.

Q. Of course, since that time, the Court authority has been procured and filed?

A. Correct. [390]

Mr. Ferguson: Continuing reading, the Master says:

“I don’t think there is any proof yet. There is no consent given by the court; I don’t know if that is necessary. I am not sure that it is necessary for the proponent here to prove any necessity other than the consent of the executor. I imagine it would be presumed he had a proper order, if it was necessary.

(Testimony of Charles C. Gardner.)

“Mr. Byrne: If there is any question about that—I take this position: I am positive that there had been none. Mr. Gardner came into my office a few days ago and thought it was very questionable that stockholders were called upon to give away stock, and says ‘I am helpless, because the bank holds an indebtedness of my mother.’

“The Master: Once and for all, I think that is the difficulty right along, that people do not regard me exactly as a Court. I am ruling on this as a matter of evidence. Mr. Byrne’s statement is no doubt true, and I would take his statement on anything, but I am a special master as such I am a judicial officer, and his statement makes no impression on me as a judicial officer.”

That ends, I think, the pertinent section of the transcript.

Q. Mr. Gardner, will you state for the record and for the special master, whether or not your acceptance of the proposed plan of reorganization was or was not dictated by the Bank of California?

The Witness: A. It was not.

Q. And, do you desire to amplify that answer?

A. My position in this matter has been right from the start, and Mr. Byrne knows this because I made the statement in his office at the time there was a meeting called there of the stockholders, that

(Testimony of Charles C. Gardner.)

[391] if it was done for the purpose of antagonizing or contesting anything the Bank of California or the trustee or the receiver has done, count me out; I did not want anything to do with it, and that has been my position and is still my position.

Mr. Ferguson: If the Court please, I don't know how far the Court wants to inquire into this matter.

The Master: I am satisfied. If anybody wants to cross examine.

Cross Examination.

Mr. Byrne: Q. Mr. Gardner, who acted as your attorney when you received this court order in the estate of McGurn?

A. Bert Levit was supposed to, but Billie Levit went with me.

Q. And who asked you to get that order?

A. Mr. Ferguson I think was the one told me the Court wanted it.

Q. Mr. Gardner, didn't you tell me in my office that you did not consider this plan fair to take away fifty per cent of your stock?

A. I thought it was pretty steep.

Q. And didn't you tell me you were in a very peculiar position with the Bank of California? Did you not, in effect, tell me you were afraid of the Bank of California?

A. I don't recall telling you I was afraid of them.

Q. What did you say?

(Testimony of Charles C. Gardner.)

A. I did tell you that I owed more, or the estate owed, than that money, and that was common knowledge. I think you knew it. I know pretty near everybody connected with the Hendy Iron Works, the old crowd, knew it. It does not strike me to be very sensible for a person to antagonize them under those conditions.

Q. That is what you stated to me at that time?

A. I never stated [392] that exactly. What it was, I don't recall, the exact wording.

Q. If you did not state that, you stated what you just repeated?

A. I would not be sure of that either. I don't try to carry it in my head.

Q. Did you say something to that effect, I mean?

A. I said awhile ago, I made some such statement, that I thought it was pretty steep.

Q. And did you not tell me at that time you would not sign the consent? A. No sir.

Q. You did not? A. No sir.

Q. You told me you were going to be present here at the meeting, did you not?

A. I believe I did.

Q. Now, Mr. Gardner, I am still your attorney of record, am I not, in the Estate of McGurn?

A. Yes.

Q. How was it you happened to have Mr. Levit go over there and get that order?

A. I don't know. In fact, it is a rather difficult one to answer. I made this statement: I haven't any

(Testimony of Charles C. Gardner.)

funds to employ any attorney and that I was not disposed to spend any money on anything of the kind.

Q. And, why didn't you come to me to represent you in the estate when I am still attorney of record there?

A. I cannot answer that. I don't know why I did not.

Q. If your McGurn stock was not pledged to the Bank of California, Mr. Gardner, would you have signed this consent? A. Certainly.

Q. You would have anyway?

A. Oh, yes. I figure that as the stock stands to-day, it is not worth very much and by this new re-organization scheme, there is a chance it may be worth something and I would rather have half [393] worth something than all of it worth nothing.

Mr. Byrne: That is all.

The Master: Any questions? That is all.

Mr. Byrne: On the second phase of the question, if your Honor please, I think it would be better to file a written argument in the matter. I am having some work done now on the question and I think we will have some authorities for your Honor, to give you my idea of what I think about the interpretation of this statute.

The Master: What would be a fair time then gentlemen?

Mr. Byrne: Say ten days.

Mr. Ferguson: If the Court please——

The Master: I understand you want to rush this all you can.

Mr. Ferguson: We do. I advised Mr. Byrne, as I advised all the others, that the Court would desire written points and authorities and, as Mr. Basick testified on cross examination he thought the plan fair, we are prepared now to file points and authorities on his behalf. Naturally, it is in the nature of a filing by *amicus curiae*. We are not the proponents of the plan.

Mr. Levin: I might say, we prepared a memorandum on behalf of the petitioning creditors, which we will file at this time.

The Master: I think five days is long enough, Mr. Byrne, to allow you.

Mr. Byrne: Make it five days from after the first, then, because we have a holiday coming on.

The Master: Are you going to file before Mr. Byrne, or do you want to file afterwards? [394]

Mr. Ferguson: We are going to file now.

Mr. Levin: May we file now and have two or three days to answer Mr. Byrne?

The Master: Five days after the first, Mr. Byrne. Is three days enough for you gentlemen?

Mr. Levin: Mr. Madison suggests we all file the same day.

Mr. Byrne: I would like to have an opportunity to reply. I am the proponent of this objection. I think I should be able to file my memorandum, let

them answer me and let me reply in the ordinary way.

The Master: I think you are entitled to do that, Mr. Byrne.

Mr. Madison: We will file now.

The Master: Mr. Byrne has the laboring oar here.

Mr. Byrne: I have the laboring oar. I think it is better for me to develop my own ideas and thoughts, you reply and I will reply in the regular way. I think it will lead to less confusion if we do that.

The Master: Five days from the first; five days thereafter and three days for Mr. Byrne. January 6th, January 11th and January 14th.

Mr. Ferguson: Then, I understand the matter is submitted on memorandum.

The Master: Yes.

[Endorsed]: Filed Dec. 6, 1935. Burton J. Wyman, Special Master. [395]

United States
Circuit Court of Appeals

For the Ninth Circuit.

GLADYS M. SHORES and HAROLD M. F.
BEHNEMAN,

Appellants,

vs.

HENDY REALIZATION CO., a corporation,
(formerly THE JOSHUA HENDY IRON
WORKS,) A. J. MAYMAN, C. B. MOORES,
E. PRICE, A. E. WEBBER and W. R. BAS-
SICK, individually and as the Directors of
Hendy Realization Co., ELMER M. HYLAND
and MORRIS LEVIT,

Appellees.

Transcript of Record

In Two Volumes

VOLUME II

Pages 495 to 944

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

No. 10085

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Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

In the Southern Division of the United States District Court, in and for the Northern District of California.

Before: Hon. A. F. St. Sure, Judge.

No. 25,937-S

In the Matter of THE JOSHUA HENDY IRON WORKS, a corporation,

Debtor

HENDY REALIZATION CO., (Formerly The Joshua Hendy Iron Works) a corporation,
et al,

Petitioners,

vs.

HAROLD M. P. BEHNEMAN and GLADYS M. SHORES,

Respondents.

No. 21,792-S Civil

GLADYS M. SHORES,

Plaintiff,

vs.

HENDY REALIZATION CO., a corporation (formerly The Joshua Hendy Iron Works, A. J. MAYMAN, C. B. MOORES, E. PRICE, A. E. WEBBER, and W. R. BASSICK, individually and as directors of Hendy Realization Co., ELMER M. HYLAND, MORRIS LEVIT, First Doe, Second Doe, and Third Doe,

Defendants.

REPORTER'S TRANSCRIPT

(Before District Judge)

Tuesday September 23, 1941.

Counsel appearing:

For Gladys M. Shores and Harold M. F. Behneman:

Leo Byrne, Esq.,

Paul S. Jordan, Esq., and

John Skinner, Esq.

For Petitioners and Defendants:

Kenneth Ferguson, Esq.,

Burt W. Levit, Esq., and

Gerald S. Levin, Esq. [399]

The Court You may proceed.

Mr. Jordan: May it please the Court: There are two matters before your Honor for trial this morning, previously consolidated. One is the case of Gladys M. Shores v. Hendy Realization Co., formerly The Joshua Hendy Iron Works, A. J. Mayman, C. B. Moores, E. Price, A. E. Webber, and W. R. Bassick, individually and as directors of Hendy Realization Company, 21,792-S in this Court, and the other case is in the old reorganization proceeding which was pending before your Honor some years ago In the Matter of the Joshua Hendy Iron Works, Debtor, No. 25937-S, and then there is the action of Hendy Realization Co., formerly The Joshua Hendy Iron Works, A. J. Mayman, C. B. Moores, E. Price, A. E. Webber, and W. R. Bassick, individually and as directors of Henry Real-

zation Company, Elmer M. Hyland, Morris Levit, referred to as Petitioners. Your Honor will observe that the defendants in the action of Shores v. Hendy Realization Company are the same as are referred to as petitioners in the reorganization matter. The action of Shores v. Hendy Realization Company, which was commenced in the Superior Court of the State of California in and for the City and County of San Francisco on January 17th of this year, is in the nature of a plenary action. The reorganization matter was instituted on February 19th of this year, through the filing of the petition on that date, in which, as I said before, the defendants in the Shores action became the petitioners, and the plaintiff in the Shores action and Dr. Behneman became respondents.

I might say that Mrs. Shores and Dr. Behneman are represented by Mr. Leo Byrne, Mr. John Skinner, and myself, and the defendants in the Shores action, that is, the Hendy Realization Company and the various named individual defendants and petitioners in the [400] reorganization matter are represented by Mr. Kenneth Ferguson, of Pedder & Ferguson, by Mr. Gerald S. Levin, of Pillsbury, Madison & Sutro, and Mr. Bert Levit, of Long & Levit.

I think that the issues involved in this litigation are rather simple, but there is a considerable factual background which I feel your Honor should have, and as to that I would like to make a rather elaborate statement, not only as to the facts——

The Court: Why confuse the issues with your statement?

Mr. Jordan: I will try not to.

The Court: You say the issues are simple, and then you wish to make an elaborate statement. Do not confuse them by an elaborate statement.

Mr. Jordan: I will do my best not to.

The Court: What are the issues?

Mr. Jordan: If I may be permitted to make a preliminary statement of the facts I think the issues will be evident.

The Court: Go ahead.

Mr. Jordan: The evidence will show that The Joshua Hendy Iron Works, now known as the Hendy Realization Company, was incorporated in 1906 as a California corporation, and from that time on up to the end of 1940, November 15 of last year or thereabouts, to be exact, was engaged in the general foundry business and machinery manufacturing business at Sunnyvale, California, where they had a very large plant.

The company got in financial difficulty in the spring of 1932, and went into a state receivership. In July, I believe, of 1935, three creditors of the Joshua Hendy Iron Works filed a petition in this court for reorganization under 77-B of the Bankruptcy Act. Your Honor may recall the matter, because the proceeding was in this court. As a result of that petition, [401] proceedings were had to the end that a plan of reorganization was formulated by the creditors and stockholders, and the matter

was referred to Judge Wyman by your Honor, and he recommended that it be approved, and on March 24, 1936 an order was entered in this court by your Honor approving and confirming the plan, and directing that it be put into effect.

I think it would be appropriate at this time so that your Honor may have the picture as we go along, that I call your attention to two paragraphs of the plan of reorganization which I consider to be vital. I refer you first to paragraph 6-G, on page 7 of the Joshua Hendy plan of reorganization, which reads as follows:

“G. Capital Stock.

“4,425 shares of the capital stock of the debtor corporation are now outstanding, said shares having a book value of \$212,898.51, but no actual value.

“In consideration of the extensions granted by the creditors and of the reduction of their claims in the sum of \$73,853.06, as aforesaid, the stockholders shall appropriately endorse and deliver the stock held by them to the board of directors of the debtor corporation, appointed as hereinafter provided, to be held by said board as follows:

“1. 50 per cent. of the shares so deposited by each stockholder shall be held in trust and voted by said board for a period of 5 years, and thereafter until the extended obligations are fully paid, so as to leave the management

of the debtor corporation during said period in the hands of its creditors. The board shall have power to vote said stock, including the power to vote for a reorganization of the capital structure of the debtor corporation, so as to provide, at any time, for an issue of one [402] or more classes of preferred stock and the exchange therefor of any part or all of the unsecured liabilities of the debtor corporation. Upon the expiration of 5 years and the payment in full of the extended obligations, such shares shall be returned to their respective owners.”

Your Honor will observe in that paragraph 6-G that the plan required the old stockholders, that is, those who were stockholders at the time the plan was confirmed, to turn in all their stock to the new Joshua Hendy board of directors, and receive back voting certificates for 50 per cent. of the holdings and the other 50 per cent. was to be held by the directors in accordance with the provisions of the second subdivision of 6-G:

“The remaining 50 per cent. of the shares so delivered by each stockholder shall be held by said board free and clear of any claim, right, title or interest therein by such stockholder, to be distributed by said board, in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company’s affairs.”

I would like to call your Honor's attention to paragraph 7, on page 8 of the plan, which refers to the method of selecting the new board of directors, which was to administer the plan. There was to be a board of five directors; three of them were to be nominated by the secured creditors, one to be nominated by the unsecured creditors, and one by the old stockholders.

Now, we come to paragraph 8, which is entitled "Effect."

"While this plan of reorganization will not expunge any of the liabilities of the debtor corporation by transferring them into capital, it will definitely postpone the payment of both principle and interest on pre-receivership obligations (excepting [403] from proceeds of assets already allocated as security and therefore not available for working capital), for a sufficiently long period to give the new management an opportunity to resuscitate the debtor corporation, while at the same time the rate of interest is materially reduced. The mere deferment of payment does not, of course, satisfy either principle or interest; but it is manifest that the definite postponement of the payment of all interest and pre-receivership liabilities for five years (so that, during such period, the debtor corporation will only be required to pay its current operating expenses, taxes, and the small balance of its receivership accounts), will af-

ford the new management a reasonable opportunity for rehabilitation. If the affairs of the debtor corporation cannot be restored within this period, drastic measures, perhaps even abandonment, will be necessary. If, however, substantial progress is made, any necessary further funding should be readily accomplished.”

Those are the pertinent portions of the plan which I wish to call your Honor’s attention to. In addition, I wish to also point out that the amount of obligations of this company at the time, or just prior to the approval of the plan, totaled—let me state it this way. The total amount owing by The Hendy Company just prior to the adoption of this plan was considerably in excess of \$600,000. I cannot seem to put my finger on the amount at the moment, but I will develop it later. By reason of that plan, that total obligation was reduced so that under the plan the company was to repay \$549,317.04. However, there was no obligation, according to the plan, to repay that until the period of five years had elapsed from the date of the approval; in other words, the company’s obligations were reduced first and then payments deferred for a period of five years; then they [404] matured. Of course, that five-year period would not mature until March 24 of this year.

Now, following the approval of this plan, and your Honor’s order directing that it be put into effect, we will show that the defendants Mayman, Moores,

and Price were almost immediately thereafter, on April 28, 1936, to be exact, elected to the board of directors of this company. They continued to act during 1936 until the annual meeting of stockholders in March of 1937, when they were re-elected, and the defendants A. E. Webber and W. R. Bassick were added to the board, and the evidence will show that the defendants Mayman, Moores, Price, Webber and Bassick continued to act as the directors of this company from March 15, 1937 until March 17, 1941.

In that connection I would like to ask counsel if they would stipulate that the defendant A. E. Webber passed away early this year.

Mr. Ferguson: Yes. There is no pleading on file in his behalf. We have not endeavored to effect a substitution of his personal representative.

Mr. Jordan: The pleading has been withheld pursuant to stipulation because of the fact that counsel were not authorized to appear for anyone.

Mr. Ferguson: That is correct.

Mr. Jordan: In any event, if I am correct, and if I am not you correct me, there was no replacement on the board from the time of his death until the annual meeting held on March 15 of this year.

Mr. Ferguson: That is correct.

Mr. Jordan: We propose to show, your Honor, that on November 4 of 1940 the management of the Joshua Hendy Iron Works had repaid [405] of the \$549,317, that is provided for to be paid under the plan, \$254,238. I am leaving off the cents.

The Court: In 1940?

Mr. Jordan: The total amount to be paid under the plan is \$549,317, and the amount that had been paid up to November 4, 1940 was \$254,238, leaving unpaid at that time \$274,965. Now, we expect the evidence to show without any doubt——

The Court: Nothing has been paid since that date?

Mr. Jordan: It has all been paid since that date.

The Court: It has all been paid?

Mr. Jordan: Yes.

On November 4, 1940, McDonald & Kahn, Inc. made an offer to the Joshua Hendy Iron Works, through the medium of Mr. Moores, one of the directors, to purchase the Sunnyvale Plant. We will show that the Sunnyvale plant and the machinery there, and the materials on hand constituted all of the operating assets of this company at that date. Mr. Moores, on November 4, 1940, presented to the board of directors of this company the proposal of McDonald & Kahn, Inc. that they receive an option to purchase the Sunnyvale plant for the sum of \$426,000, with certain adjustments to be made relative to pending jobs. After discussion at that board meeting a resolution was adopted under which it was determined that the option should be granted at that figure. That option was to expire at noon of November 15, 1940, some eleven days later.

In addition, the option also provided that in the event that it was exercised by McDonald & Kahn,

Inc. that the Joshua Hendy Iron Works would relinquish any further right to the use of the name of The Joshua Hendy Iron Works.

We expect to show on or about November 15, either McDonald & [406] Kahn, Inc., or Felix Kahn, as assignee of McDonald & Kahn, Inc., exercised that option, and within a matter of a very few days thereafter, I believe somewhere around the 19th of November, the full purchase price was paid, subject to later adjustments on current work.

We expect to show that shortly following the consummation of the sale of the plant that all of the then unpaid or remaining unpaid obligations of the company under the plan, as I said before, in the amount of \$274,965, were paid. That left the company with assets consisting of, as I understand it—I do not think we will have any difficulty in getting this, because I presume that counsel will stipulate to a great many of these facts—accounts receivable, cash in bank, unimproved lot in San Francisco, some office furniture here in San Francisco, where the company maintained its administrative office, and if there were any further assets I am not familiar with them. I believe there was a Nash automobile, but, in any event, those were the remaining assets.

The Court: What was the value of the remaining assets?

Mr. Jordan: That is something I will have to develop from the evidence. I am not acquainted with

the amount of the value. I do not believe they have all been liquidated.

On November 15, about the same time that the purchase price was paid for the plant by Mr. Felix Kahn, as assignee of McDonald & Kahn, Inc., the board of directors of the company met and adopted a resolution authorizing the change of the company's name from The Joshua Hendy Iron Works to its present name, Hendy Realization Company, and at a meeting of the stockholders immediately thereafter the stockholders, being also the voting trustees of all the outstanding stock, that change was ratified, and I believe [407] on or about December 2 proceedings necessary to effect that change of name were concluded, so that since December 2 the name has been Hendy Realization Company.

We propose to show that from November 15, 1940, this company has done nothing, practically, in the way of carrying on business other than to effect a liquidation and wind up.

On December 4, 1940, there was another directors meeting, and we propose to show at that particular meeting additional compensation was declared by the board of directors in the total amount of \$102,729.76.

The Court: What was that for?

Mr. Jordan: That is something I cannot answer. It was referred to in the minutes, and in the financial statements that have been issued as additional compensation for 1940. On that occasion Mr. Bassick, the president and manager of the company

received a bonus or additional compensation of \$40,000, Mr. Hyland was voted \$20,000, Mr. Levit was voted \$20,000.

The Court: What was that for?

Mr. Jordan: I will endeavor to develop that during the trial.

The Court: Very well.

Mr. Jordan: I might say at this point, from the time the company came out of 77-B proceedings on March 24, 1936, when your Honor signed the order confirming the plan, up to 1940, in each year, as I recall, bonuses were voted, but the largest amount of bonus in any year during that interim up to 1940 was at this time, and I think the records of the company will so show.

The Court: You say \$102,000 went to the directors?

Mr. Jordan: Only to the extent that Mr. Bassick was a director of the company at that time; Mr. Hyland and Mr. Levit [408] were vice-presidents, but were not directors. Mr. Bassick was a director and also president. In addition to the \$40,000 paid to Mr. Bassick, and \$20,000 each to Mr. Hyland and Mr. Levit, other employees got lesser amounts in the remaining amount of the total of \$102,729.

The Court: That was what date?

Mr. Jordan: December 4, 1940.

Then on December 20, 1940, there was still another board meeting of this company, and the same directors who were still in office, Bassick, Mayman, Moores, Price and Webber, none of them at that

point stockholders of the company, adopted a resolution which provided, in effect stated, that the affairs of this company had been successfully rehabilitated, and then went on to say that, in accordance with the plan of reorganization, the three managing officers, Bassick, Hyland and Levit, were entitled to receive the 2112 $\frac{1}{2}$ shares of stock which had been held by the board of directors, and which had previously been surrendered, as your Honor will recall, at the time the plan of reorganization was approved and confirmed; they voted that Mr. Bassick, Mr. Hyland, and Mr. Levit, by reason of the successful rehabilitation of the company, on December 20, were entitled to receive distribution of 2212 $\frac{1}{2}$ shares of stock held by the directors in trust up to that time.

I may also say that we will show that on that date, on December 20, 1940, there were only 4120 $\frac{1}{4}$ shares outstanding as against 4425 at the time that the plan was confirmed. The reason for that was that the company, sometime in the spring of 1940, had effected a compromise with Mrs. Albertie M. Hendy, one of the old stockholders, whereby her stock had been surrendered to the corporation in extinguishment of an obligation that she owed, [409] amounting to some \$3000, or thereabouts. So that on December 20, the old stockholders held a beneficial interest in 1907 $\frac{3}{4}$ shares, whereas by reason of the distribution to which I have just referred, Mr. Bassick, Mr. Hyland, and Mr. Levit were then owners of 2212 $\frac{1}{2}$ shares of the company stock—in the hands

of Mr. Bassick, Mr. Hyland, and Mr. Levit on December 20, 1940, as against $1907\frac{3}{4}$ shares remaining outstanding in the hands of the old stockholders. That is to say, they held voting trust certificates for the number of shares, with the voting right reserved to themselves, that were still in the hands of the board as voting trustees under the plan.

Then we propose to show immediately following the adjournment of this directors meeting on December 20, that a stockholders meeting was held, at which all of the voting power represented by the outstanding stock was present, namely, the same number of directors as voting trustees, and Mr. Bassick, Mr. Hyland, and Mr. Levit, who had just received their $2212\frac{1}{2}$ shares, proceeded to adopt at that stockholders meeting—and I might say, of course, there were no stockholders present—they adopted a resolution which ratified and approved all of the acts and proceedings of the board of directors upon the date of the last previous annual meeting of stockholders, which was held on March 18, 1940.

On the same day, I believe it was, there was a first liquidating dividend declared of \$45 a share in favor of the $1907\frac{3}{4}$ shares then outstanding in the hands of the old stockholders, but Mr. Bassick, Mr. Hyland, and Mr. Levit were specifically excluded from participating in that first distribution; and that dividend was subsequently paid on all of those shares to the old stockholders, totaling \$85,848.75.

The Court: Give me that date again.

Mr. Jordan: That was on December 20, your Honor.

The Court: The dividends were how much?

Mr. Jordan: The total amount of dividends was \$85,848.75.

The Court: That is to the old stockholders?

Mr. Jordan: That is to the old stockholders holding the beneficial interest at that time in 1907³/₄ shares.

We expect to show that the following day, I believe it was the following day, but anyway the records will substantiate it, another stockholders meeting was held at which it was determined that the affairs of the Hendy Company be wound up and dissolved, and proceedings were then immediately thereafter instituted in that direction and are at the present time pending.

In the meantime, on November 23, I think the date was, 1940, and prior to December 20, when this stock was distributed, on behalf of Dr. Behneman, I wrote a letter addressed to the Board of Directors of The Joshua Hendy Iron Works, at their office in San Francisco, and that letter, in fact, stated that it was Dr. Behneman's understanding that there was to be some distribution of 2212¹/₂ shares of stock; that upon the facts as we knew them, that successful rehabilitation within the meaning and intent of the plan of reorganization, and putting the company out of business as a going concern, those facts would not justify the conclusion of a successful rehabili-

tation, and asked that Dr. Behneman and ourselves be advised prior to the taking of any action by the board for distribution of that stock, so that Dr. Behneman could take such steps as he might see fit to protect his rights. We received no reply to that letter, and notwithstanding it the distribution took place.

On March 17, 1941, which is the date, which is the annual [411] stockholders meeting date, a new board of directors was elected, consisting of Mr. Charles R. Gardner, Mr. Stanley Pedder, one of the attorneys for the company, Mr. Hyland, Mr. Levit and Mr. Moores, and they constitute the board of directors of the company at the present time.

It is our understanding, and we propose to show your Honor that it is the intention of the present board of directors, or was the intention of the board which succeeded last March, as soon as the assets of the company had been finally turned into money to pay further liquidating dividends straight across the board, not only on the 1907 $\frac{3}{4}$ shares in the hands of the old stockholders, but likewise on the 2212 $\frac{1}{2}$ shares in the hands of Mr. Bassick, Mr. Hyland, and Mr. Levit. The Shores action is in the nature of a declaratory relief action, and the real gist of the matter is to obtain a judicial determination of whether or not the distribution of this stock by the Hendy board, and I refer to the 2212 $\frac{1}{2}$ shares distributed on December 20, 1940, was illegal. Of course, that question hinges upon the further fundamental question of whether or not the affairs

of the Hendy Company had become successfully rehabilitated on December 20, when the distribution was voted.

The Court: When you say "distribution," you mean the distribution of 2212½ shares?

Mr. Jordan: Yes, that is correct. We are seeking to have that distribution, under the facts as I have related them to your Honor, declared illegal, and that the defendants Hyland, Levit, and Bassick be required to surrender back that stock, in order that it may be canceled or returned to the original stockholders, as your Honor may direct, and that any further liquidating dividends be paid only on 1907¾ shares of stock presently [412] outstanding in the hands of the old stockholders.

The Court: Where is that language "successful rehabilitation" used in the plan?

Mr. Jordan: Paragraph 6-G 2.

The Court: That is what you read to me?

Mr. Jordan: I read that to your Honor a little earlier, on page 7 of the plan, paragraph 6-G 2.

We are also going to show your Honor that between March 24, 1936, when your Honor approved this plan of reorganization, up to December 31, 1940, Mr. Bassick, Mr. Hyland, and Mr. Levit, inclusive of salaries, received during that period a bonus—received, respectively, the following amounts: Mr. Bassick \$83,101.82; Mr. Hyland \$46,216.57; Mr. Levit \$45,517.50. And, in addition, Mr. Bassick, at the end of last year, was voted a Nash automobile which belonged to the company.

Now, further, very briefly, on the question of the history of this litigation, the Shores action was removed to this court by petition, and your Honor may recall that I made a motion to remand, and that motion was denied by your Honor upon February 17. This petition was filed under the old reorganization proceeding.

The Court: By your clients?

Mr. Jordan: No, the petition in the reorganization proceeding was filed by the very individuals who were defendants in the Shores action, in other words the Hendy Realization Company, Mayman, Moores, Price, Bassick, Hyland and Levit, all defendants in the plenary action of Shores v. Hendy Realization Company, et al., became the petitioners in the reorganization matter, their petition being filed in this court on February 19, of this year, at which time there were pending not only the Shores action, but [413] also in the State court a similar action of Behneman v. Hendy Realization Company, et al.

The Court: What is the suit of Hendy Realization Company v. Behneman and Shores.

Mr. Jordan: The purpose of it, that is the only relief sought is to permanently enjoin further prosecution of the action which was never removed from the State Court to this court.

The Court: That suit was never removed?

Mr. Jordan: It was never removed, it is still pending there. Upon the filing of that February

19th petition, and upon the filing of a subsequent petition a few days later, your Honor issued an order to show cause returnable before Judge Wyman, and also a temporary restraining order restraining the prosecution of the Behneman action and the Shores action, and also an action under Section 403 of the Civil Code now pending in the State Court, in which Dr. Behneman, as petitioner, sought to have the court assume jurisdiction over and supervision of the winding up of the affairs of the company. The matter was heard before Judge Wyman on reference by your Honor. We had made a motion to dismiss the February 19th petition on the ground that it failed to state a claim against respondents upon which relief could be granted, the only purpose being to stay litigation and prevent us from going forward, and on the further ground that this court had no jurisdiction over the subject-matter referred to in that petition.

Our basis for that contention was this, that on January 27, 1937, your Honor entered a final decree in the matter of The Joshua Hendy Iron Works, in the 77-B proceeding, and paragraph 16 of that final decree, which I take it is a matter of record in this proceeding, inasmuch as we are presumably in that [414] proceeding, read—and I am quoting:

“That the proceedings for the corporate reorganization of the debtor in this court entitled ‘In the Matter of The Joshua Hendy Iron Works, a corporation, Debtor, No. 25937-S,’

be, and the same hereby are, terminated and closed; such termination and closing to be for all purposes final upon the filing herein of receipts showing the payment of the final fees and expenses hereinabove allowed, and the surrender and exchange of the stock certificates which have not yet been surrendered and exchanged as provided in said plan of reorganization.”

Judge Wyman denied our motion to dismiss and held in fact that this Court did have jurisdiction in the matter under 77-B proceedings, and rendered a report to your Honor, to which we filed an objection. This objection came on for hearing on the same day that the defendant's motion to dismiss the Shores action came on. The result was your Honor denied the motion to dismiss the Shores action and ordered the consolidation of the two matters for trial on this date.

I think now I have covered the matter.

The Court: I suppose you might renew your motion.

Mr. Jordan: I would like at this time, your Honor, for the purpose of the record, to renew our motion to dismiss the petition filed in the reorganization proceeding on February 19, 1941, upon the grounds, your Honor, that the petition fails to state a claim upon which relief can be granted; secondly, that this court lacks jurisdiction over the subject-matter referred to in the petition. I should also

like to renew our written objections to Judge Wyman's Report, which is also undetermined at this point, upon all of the grounds referred to in those written objections which are now on file. Both these motions are made [415] pursuant to rule 12 (b) of the Rules of Civil Procedure of this Court.

I assume that counsel for the defendants and petitioners will want to make a statement to your Honor, and then we can proceed with the evidence.

Mr. Ferguson: If your Honor please, with respect to this matter of jurisdiction, I may point out that this court has, in connection with the Shores action, found that this court has jurisdiction over this type of proceeding, and that the only thing left involved in Mr. Jordan's motion to dismiss is whether or not the court had any power to exercise that jurisdiction also in the 77-B proceeding, and upon that Judge Wyman has reported fully.

Now, your Honor, not to cover any of the ground Mr. Jordan covered in so far as general outline is concerned, I think it might be helpful to point out several things, more in anticipation. In 1936, when this company was reorganized, this company expressly was found to be and admitted to be by the same attorneys that represented Dr. Behneman then to be insolvent, and the court expressly found that it was insolvent; Judge Wyman's report showed it was insolvent, and showed that the stock that is involved was absolutely worthless. At that time

the same attorneys, on behalf of Dr. Behneman, and I might point out Mrs. Shores' counsel in open court objected to, and the same attorneys urged, that the Court had no power to authorize the taking away of 50 per cent of their stock for the purpose it was taken away in the plan.

Judge Wyman's report showed, after long hearings, that the stock was absolutely worthless. The plan provided, as was pointed out, that only 50 per cent of the stock was to be retained by the stockholders, and the other 50 per cent of the [416] stock was to be taken over free and clear of any claim by them; all of the stock was to be held by the voting trustees, and 50% taken from them was to be issued in the discretion of the board of directors, either in whole or in part, to the managing officers as a reward for management, and the successful rehabilitation of the company's affairs. That stock was distributed, but counsel is wrong when he says that the stock was distributed to the directors, not representatives of the stockholders. The stock was not distributed except in one case to any of the directors, and that was Mr. Bassick, president of the company, and he did not participate in any of the voting on the distribution. Two of them represented bank holdings, which were the second largest stockholders, so, therefore, it was very much against their interest to have distributed this stock, and to distribute the bonus, if the plan had been otherwise.

Now counsel referred to the fact that the net

worth was scaled down substantially. As a matter of fact, it was only scaled down some \$15,000, even after reorganization, and after they had all of the scaling down, this corporation still had a net worth of \$61,000. The board of directors and the management, in the intervening time, and up to the time of the distribution of the stock, as will be shown by the records, built the net worth up to something like \$300,000 from \$61,000.

It is significant that Mr. Jordan keeps repeating the words "successful rehabilitation of the company's affairs". The plan says that the stock is to be distributed, that is, 50% of the stock here involved, by the board in its discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company's affairs. [417]

Mr. Jordan's contention is that there must have been a successful rehabilitation before this stock could be distributed. We do not concede that. But assuming for the moment that his contention be correct, that there must have been a successful rehabilitation of the company's affairs before the stock could be distributed, the fact is that the evidence will show that this company was rehabilitated for some years prior to the time that the stock was rehabilitated.

The definition of "rehabilitation," if your Honor please, is not open to speculation. There are abundant cases under Section 75 of the Bankruptcy Act which hold that "rehabilitation" is a word of little

variety of meaning; that it means that you put it back into a solvent corporation, build it back as a going concern; give it some real worth; that is what "rehabilitation" means. It does not mean that you pay off all of its debts 100 per cent. As I say, the company has for more than two years been rehabilitated, that is, for more than two years prior to the distribution this company had a very real, substantial net worth, and under the decisions of the company was rehabilitated.

This, of course, counsel says, under his theory, is a question to be determined, but this determination, if your Honor please, is only incidentally one of law, because the legal definition of "rehabilitation" is, as I say, of little variety. There is no doubt in our mind the court should apply the law rule.

The primary question whether this company has been rehabilitated, or not, under his theory, is a question purely and simply of fact, as to the extent it acquired net worth and to what extent it was solvent.

Now, the directors, by their resolving a distribution of [418] the bonus in stock did determine the question. They, of course, are the persons most familiar with that question of fact. I presume that the court will follow the general rule so far as the question of fact is concerned, that it will not substitute its own judgment for that of the directors, because there is no charge here that they did not exercise it bona fide. There is no question of fraud

or anything of that sort. However, if the Court is not content to follow that rule, but does desire to delve into it, it is simply and purely a question of accounting which we are prepared to prove, that this company actually was rehabilitated; but we cannot do that by just looking at some single set of figures.

I want to point out that although I think Mr. Jordan's statement was in substance correct, I wish to refer to some figures, because they are not correct. He has made the error of referring to some figures taken from the plan, where, unfortunately, owing to the fact that there were some entries before the plan was finally confirmed, so that the figures were colored by the additional entries before the plan could be confirmed. But it is a question whether the company has been rehabilitated or not, whether it has become solvent, whether it has acquired a net worth, as a fact; that is simply a question of accounting, how much net worth did this corporation acquire, what did they do with the physical assets, did they put money in? We will show that not only did the net worth increase from \$61,000 to something over \$300,000, but there was money put back into the plant, both by way of capital assets and by way of operating expenses. This company lost during the two years prior to Mr. Bassick coming in \$183,000. That is the type of corporation that this management took over. [419]

Now, in our opinion, even under his own theory, that there must have been successful rehabilitation,

the question is, Was there a successful rehabilitation of this company, and had it been rehabilitated more than two years; and the proof of that is purely and simply a matter of accounting.

Counsel says there is no element of accounting involved, and yet he wholly ignores his complaint in the Shores case. In that case he prays for a complete accounting of all the stock that was distributed and any dividends, and anything of that sort. In our opinion that answers counsel's contention, because that is his theory of the case. But there is still an entirely separate ground, and that is this, counsel has wholly ignored these words as to how this stock could be distributed, and that is, "As a reward for management."

Now, the words "for management" must be viewed in the light of the plan, itself, of the capacity of these skilled men. The language must be interpreted in the light of the plan, itself, in the light of the proceedings that were had. The words "for management" in there mean just as much as "successful rehabilitation of the company's affairs," and we submit the court must give the effect to those words, which was plainly the intent of the plan, that the stock should be distributed as a reward for management; and this intention is manifested by many facts.

The evidence will show that all of these officers who were ultimately rewarded, immediately following reorganization proceedings, agreed with the creditors of the company to work for less than the

value of their services, under the understanding that they would eventually receive cash and stock to make up the difference in value.

We will show that the same officers who continued after re- [420] organization received substantially less than they received immediately prior.

We will show that all of the officers received a lesser wage than they had been receiving prior to the time of the reorganization, and that, of course, shows an express understanding that they would get stock for management.

I point out that in objecting to this plan of reorganization counsel contends that this language, here, constituted no restriction on the directors and they could give the stock away at any time they chose, in their discretion, and that was never contemplated in the reorganization proceeding, that it was not the intent that this stock should be distributed in the discretion of the board of directors.

Now, turning to the plan, itself, it says—counsel read all of paragraph 8 of the plan. Reading all that paragraph at length might not bring out the fact. Paragraph 8 says:

“While this plan of reorganization will not expunge any of the liabilities of the debtor corporation by transferring them into capital, it will definitely postpone the payment of both principal and interest on pre-receivership obligations (excepting from proceeds of assets

already allocated as security and therefore not available for working capital).”

You will notice that that resuscitation of the debtor corporation is to occur before anything has been paid on pre-receivership obligations—the whole reorganization indebtedness is outstanding.

To continue:

“The mere deferment of payment does not, of course, satisfy either principal or interest; but it is manifest that the definite postponement of the payment of all interest and pre-receiver- [421] ship liabilities for five years will afford the new management a reasonable opportunity for rehabilitation. If the affairs of the debtor corporation cannot be restored within this period, drastic measures, perhaps even abandonment, will be necessary. If, however, substantial progress is made, any necessary further funding should be readily accomplished.”

In other words, by the express terms of the plan it is clear that this stock could be distributed before there had been any payment at all upon the receivership obligations, that rehabilitation would occur even before any rehabilitation proceedings had been paid.

Now, one other consideration. Under the plan of reorganization the stockholders were given only 50 per cent. of their holdings of stock, and the other

50 per cent. of the stock was given to other persons. The distribution is not here involved, and this case does not affect the 50 per cent. distribution which went to the stockholders. There at all times has been 50 per cent. outstanding for the old stockholders and 50 per cent. delivered by the stockholders to be distributed as a reward for management and successful rehabilitation. The distribution now that they complain of does not affect the amount they would receive. What they are trying to do here is to have the 50 per cent. canceled that were surrendered at the time the plan of reorganization was approved, so that their holding now of 50 per cent. again becomes 100 per cent. In other words, they are trying to expressly avoid a provision of the plan of reorganization. At the time the plan was made it was provided they should only have 50 per cent. interest in this company; the company was insolvent; that was a gift to them. The other 50 per cent. was put in to be distributed as a reward for management and the suc- [422] cessful rehabilitation. Whether or not the distribution to the management be correct or not, it could not affect these people one iota. What they want to do is have the stock of these people cancelled, the people that got it as a reward for their services; those people worked for much less than they had received before, and they expressly worked knowing that they were going to get this stock. Now, they want to have that cancelled so that the 50 per cent. which

they have always had will amount to 100 per cent. That, we submit to the Court, is grossly inequitable.

With respect to whether or not this is an accounting matter, we do not want to misrepresent matters to the Court, at all. The legal question, we submit, is of minor importance here. We submit that the court's determination, even under their theory, involves an accounting of the corporation's affairs, and in arriving at that a comparative examination of the affairs of the corporation from year to year must be had, and certainly in the last analysis an examination of the affairs of the corporation as they existed at the time of the plan of reorganization went into effect, and as it was at the time the distribution was made.

Counsel referred to cash distribution, in addition to a stock distribution, pointing out to the Court that that cash distribution, in effect, although not so stated, constituted a first liquidating dividend on the stock, because when the stock was distributed to the management, the management expressly was excluded from participating in these dividends. The old stockholders had been declared dividends of \$45 a share on the stock, and those dividends were due to the efforts of the management. [423]

Now, the cash distribution is not here involved. The only thing involved is the stock.

These same counsel and these same parties have filed another action in the State Court involving the cash distribution, so it is not here before your

Honor. We think they all should be here, but it was recently filed, it is not at issue. That question might be determined here, but the fact is that cash distribution is not here involved. The sole question is the distribution of that stock.

If the Court wishes to proceed, that is entirely satisfactory to us.

The Court: I was wondering how far we could proceed.

Mr. Ferguson: We are prepared to proceed. We have had audits made, and we are prepared to go fully into the question of fact covering appreciation of net worth and rehabilitation as a going concern. That is the question that has to be determined, if Mr. Jordan is correct, whether or not there was a rehabilitation.

The Court: Mr. Jordan, I think you are wasting my time. This is an accounting matter.

Mr. Jordan: I did not expect we were going to argue the matter.

The Court: I know, but what are you going to put in as proof now? You are going to put in certain proof, and the other parties will put in the books. I do not want to go any further with this matter if it be an accounting.

Mr. Jordan: I will tell your Honor exactly what I propose to put in the record in the way of evidence on this matter of the company's financial condition. In my mind there seems to be a very great desire on the part of counsel to get this case

out [424] of this court, get it referred to a master. They have got the table full of books, there, which I do not propose to refer to. The theory of my case is, here we have a plan of reorganization which reduced the amount of this company's obligations, and says in effect you do not have to pay them for five years period of time. The purpose was not to liquidate, but to resuscitate, and if possible to return the corporation in good condition back to the stockholders.

This company goes along for four and a half years; in other words, from March 24, 1936 until November 15, 1940. They have only a matter of four or five months to go until that five-year period expires, when they will have to meet all the unpaid obligations of the debtor under the plan. During that period, and up to November 15, 1940, out of \$549,000 that was deferred on this plan, they had paid less than 50 per cent., they still had that remaining amount to raise, because it was all going to mature in a matter of four or five months. I do not think there is any question of doubt but what the court considered when this plan was approved and the stockholders considered, and the creditors considered that if at all possible they would have this business as a going concern; instead of doing that, on November 15 they sold their plant, and the only resuscitation was the sale.

The Court: From your statement, it would be possible for you to stipulate as to the facts in this case, would it not?

Mr. Jordan: I think that we can stipulate to a great proportion of the facts that I want to put in. Going back to the question of accounting, I am going to put on one expert.

The Court: I am not going to take any accounting, I tell you that before we take any evidence here. [425]

Mr. Jordan: All that I want the accountant that I am going to call to do is—I do not want him to go through these books—is to analyze the statements of this company from 1936 to 1940; he has made an analysis of those statements and what I want to do is to get up on the stand and tell your Honor, as far as the company's condition is concerned in March, 1936—it is all right here in the plan of reorganization; there cannot be any question about it. It shows that concern had a certain amount of money. I am going to put that accountant on the stand and, using their own figures, have him to state to your Honor whether they were making money in 1936, from March to the end of the year, whether they made any money in 1937, 1938, 1939 and 1940, and I am going to practically limit the testimony to giving you this conclusion without any premise. I think that is all your Honor is interested in knowing. You know what the deficit was at the time the plan was approved, and you are going to be told what the deficit was by their own books at the time that they sold that plant. As a matter of fact, I am going to prove to you through

this witness that whereas they made an operating profit of somewhere around \$20,000 in 1940, when they declared this \$103,000 bonus, they wound up with a loss for 1940 of about \$79,000. That is not successful rehabilitation, your Honor.

The Court: Mr. Jordan, I shall permit you to proceed because of the statement you have made, but I want you to understand if I think it is necessary to refer this matter for an accounting I am going to do it. I do not think that you are going to have such smooth sailing as you think. Unless they stipulate the facts with you, the facts can only come from the books, themselves. [426]

Mr. Jordan: That is not the way as we see it.

The Court: All right, go ahead.

Mr. Jordan: First, your Honor, I would like to introduce in evidence as Exhibit No. 1 of Plaintiff Shores and Respondents Shores and Behneman, a copy of the plan of reorganization of The Joshua Hendy Iron Works.

Mr. Ferguson: No objection.

The Court: It may be admitted and marked.

(The document was marked "Plaintiff's Exhibit 1.")

Mr. Jordan: Your Honor, I would like to summarize this portion of the pleading, because we can get this out of the way. I told you what we expected to show, a substantial portion of it.

In the first place, and counsel should follow me on this, paragraph 1 of the Shores Complaint refers to the corporate entity of The Hendy Company,

and to the change of name from The Joshua Hendy Iron Works to the Hendry Realization Company on December 2, 1940. Will it be stipulated the change of name was on that date?

Mr. Ferguson: Yes.

Mr. Jordan: It is stipulated that the name of the corporation was changed on December 2, 1940, from The Joshua Hendy Iron Works to Hendy Realization Company.

Paragraph 6 of the Shores complaint refers to the institution of the involuntary proceedings against The Hendy Company for the corporate reorganization under Section 77 of the Bankruptcy Act, that is admitted.

Paragraph 7 refers to the filing of the proposed plan of reorganization under Section 77-B of the Bankruptcy Act and to the approval and confirmation of that plan by your Honor on March 24, 1936, as well as to the court's direction that the plan be [427] carried into effect.

Paragraph 8——

The Court: That is not admitted.

Mr. Jordan: That is admitted. Paragraph 8 refers to the number of outstanding shares of capital stock as of March 24, 1936, the date of the confirmation of the plan, to be 4425 shares, and that the outstanding indebtedness of the Hendy Company prior to the confirmation of the plan was \$623,170.14; that is, that was the amount of indebtedness on July 31, 1935, and that is the amount referred to in

the statement appended to the plan. That indebtedness was reduced under the terms of the plan by 10 per cent. to \$549,317.04. It is also alleged in that paragraph that the payment of that reduced amount was extended for a period of five years. That also, I believe, is admitted by the pleading.

Mr. Ferguson: I find upon a report here in July, 1935, covering the total amount of indtebedness at March 24, 1936, at the time the plan was approved, \$644,732.27.

Mr. Jordan: What is that?

Mr. Ferguson: That is the amount of obligations.

Mr. Jordan: That was scaled down, but before scaling the amount of obligations——

Mr. Ferguson: That was on March 24, 1936, the date the plan was confirmed, immediately prior to confirmation.

Mr. Jordan: By reason of the scaling of it the plan confirmed that the amount of \$549,317.04 would be the amount paid to the creditors.

Mr. Ferguson: No. The reason for this difference is this, that these figures Mr. Jordan has are figures as of July, 1935, but the plan was not confirmed until nine months later; in the [428] meantime there was a lot of interest accrued and the balance taken on March 24th was \$559,969.72.

The Court: Are the statements made by you and by Mr. Ferguson admitted as facts?

Mr. Jordan: If Mr. Ferguson tells me that those are the figures I am willing to accept them.

Mr. Ferguson: That is what the books show.

Mr. Jordan: Will you repeat them again for the record? Those figures which you are about to give, as I understand it, will constitute, first of all, the amount of the original obligations of the company as of March 24, 1936, immediately before the plan was confirmed, and then the amount that was to be paid under the plan as reduced immediately upon confirmation.

Mr. Ferguson: The receivership obligations before the plan was confirmed on March 24, 1936, the total of principal and interest was \$644,732.27. The balance after reduction was \$568,606.82, plus income tax not contemplated by the plan, of \$1362.90, making a total balance of principal and interest after reduction of \$569,969.72.

Mr. Jordan: That will be stipulated.

Paragraph 9 sets forth in full paragraph 6G of the plan of reorganization which I read to your Honor, and that, of course, is admitted, as well as paragraph 10, which sets forth in full paragraph 8 of the plan under the heading of "Effect."

Paragraph 13 refers to the granting of an option for the sale of the Sunnyvale plant on November 4, 1940, and exercising of the option on November 15, 1940, and to subsequent confirmation of the sale for, as alleged, over \$400,000. The actual amount I believe is stipulated as \$426,000, with adjustments depending upon current work. [429]

Mr. Ferguson: Yes, the amount was \$426,000.

However, as you pointed out, there was a substantial adjustment.

Mr. Jordan: That paragraph also refers to the incorporation of The Hendy Company in 1906, and to its engaging in the general foundry and metal products manufacturing business at Sunnyvale, and to the discontinuance of further business by reason of the sale of the plant and all operating equipment at Sunnyvale. Those facts are all admitted, are they not?

Mr. Ferguson: Yes.

Mr. Jordan: And will be stipulated?

Mr. Ferguson: Yes.

Mr. Jordan: I think the only difference is that the sale was actually consummated or made to Felix Kahn, as assignee for McDonald & Kahn, Inc.

Mr. Ferguson: That is right, he exercised the option.

Mr. Jordan: Now, we filed an answer. Those are the admitted facts under the Shores complaint. We filed an answer and counter-claim to the petition in the reorganization matter, and in that counter-claim there are three or four additional issues raised. The election of a new Hendy board of directors on March 15, 1941—your Honor will bear in mind that the old board was still in office at the time that the Shores action was filed. Will it be stipulated, gentlemen, that on the date of March 17, 1941 Mr. Charles R. Gardner, Mr. Stanley Peder, Mr. Levit, Mr. Hyland and Mr. Moores were

elected as directors of the Hendy Realization Company?

Mr. Ferguson: Yes.

The Court: What paragraph is that of the counter-claim?

Mr. Jordan: That allegation as to the election of the new board of directors on March 17 of this year, your Honor, which [430] has just been stipulated to, appears in paragraph 9 of the counter-claim of respondents Behneman and Shores. I might add that is only a portion of the allegation of that paragraph but other matters have already been covered. I am trying to locate the allegation as to the date of the entry of the final decree.

The Court: Do you know what that was, Mr. Ferguson?

Mr. Ferguson: Yes, your Honor, January 27, 1937.

Mr. Jordan: That will be stipulated, will it?

The Court: What is the date?

Mr. Jordan: January 27, 1937. Incidentally, Mr. Ferguson, will it be stipulated that paragraph 16 of the final decree in the reorganization matter read as I have quoted it to the Court in my opening statement?

Mr. Ferguson: I have a copy of the final decree and you can put it in if you wish.

The Court: The Clerk has handed me the final decree. It was filed on January 27, 1937.

Mr. Jordan: Will it be so stipulated, that the final decree was entered on January 27, 1937?

Mr. Ferguson: I thought I had so stipulated.

The Court: Is there something else in that decree besides that—it reads: “That the proceedings for the corporate reorganization of the debtor in this court entitled ‘In the Matter of The Joshua Hendy Iron Works, a corporation, Debtor, No. 25,937-S,’ be and the same hereby are, terminated and closed; such termination and closing to be for all purposes final upon the filing herein of receipt showing the payment of the final fees and expenses hereinabove allowed, and the surrender and exchange of the stock certificates which have not yet been surrendered and exchanged as provided in said plan of reorganization.” [431]

Mr. Jordan: Will it be stipulated that paragraph 16 of the final decree in the reorganization matter read as just read by the court?

Mr. Ferguson: Oh, yes, certainly, so stipulated. I will not stipulate to its legal effect, of course.

Mr. Jordan: Now, the next matter raised by the counter-claim of respondents Behneman and Shores in the reorganization matter is the allegation referring to the communication to the board of directors on November 23, 1940. I wrote the letter on behalf of Dr. Behneman, questioning the right of the board to distribute the 2212½ shares of stock to Mr. Bassick, Mr. Hyland, and Mr. Levit upon the ground that, under the circumstances which developed up to that time, successful rehabilitation under the plan has not been accomplished. The re-

ceipt of that communication is admitted. That is correct, is it not, Mr. Ferguson?

Mr. Ferguson: I think so. I cannot say exactly. It was about the time the letter is dated.

Mr. Jordan: And finally, there is an allegation in the same counterclaim to the effect that the authorization of this Court to distribute that stock to Mr. Bassick, Mr. Hyland, and Mr. Levit was not obtained by the board of directors prior to the distribution, and that is also admitted.

Mr. Ferguson: That is no special authorization, that is what you mean; in other words, no special order?

Mr. Jordan: No application was made for an order of the court preliminarily to the distribution of 2212½ shares.

Mr. Ferguson: Yes.

Mr. Jordan: Will it be stipulated, Mr. Ferguson—by the way, Mr. Ferguson, you, and Mr. Levin and Mr. Levit, are not [432] appearing separately or individually?

Mr. Levit: We are representing all of the defendants. Mr. Ferguson has the handling oar.

Mr. Jordan: As to the facts stipulated and now admitted, they will be joined in by both of you?

Mr. Levin: Correct.

Mr. Levit: Correct.

Mr. Jordan: Mr. Ferguson, will you stipulate that on March 24, 1936 there were 4425 shares of capital stock of The Joshua Hendy Iron Works outstanding, and referred to in the plan?

Mr. Ferguson: With this qualification, I believe there were 900 shares of preferred stock; that 900 shares was subsequently retired; outstanding and beneficially held there were 4425 shares.

Mr. Jordan: That so appears in the plan of reorganization at the beginning of paragraph 6-G.

Mr. Ferguson: Yes.

Mr. Jordan: On that date, March 24, 1936 plaintiff and respondent Gladys Shores owned 607 shares of the outstanding shares, did she not?

Mr. Ferguson: Subject to this qualification, during the time of this 77-B proceeding there was a trustee appointed, and there were no corporation officers so as to enable a transfer of that stock, and although we understand that she owned it during that time, it actually was not transferred to her, and I cannot give you a stipulation to that effect, but I am perfectly willing to stipulate what her present ownership is.

Mr. Jordan: It is a fact, is it not, that pursuant to the plan of reorganization on the date, which I do not believe is particularly material, suffice to say it was between March 24, 1936 and November 15, 1940 Mrs. Gladys M. Shores surrendered [433] to the proper transfer officer of the Hendy Company 600 shares of stock to the company and received back trustees' certificates for 3031½ shares.

Mr. Ferguson: That is correct.

Mr. Jordan: And the other 3031½ shares representing that holding were thereafter, from the date

of their surrender, held by the board of directors as voting trustees under the plan?

Mr. Ferguson: Until its distribution.

Mr. Jordan: On December 20, 1940. Will you make the same stipulation with respect to Dr. Behneman, that is to say, that prior to the surrender of his shares to the board of directors subsequent to March 24, 1936 and prior to November 15, 1940, he owned $1244\frac{1}{2}$ shares of Hendy stock.

Mr. Ferguson: I will so stipulate, but he did not surrender his shares, he refused to surrender his shares until 1940, I believe. And the record that he received in return half that amount would indicate that he surrendered $1244\frac{1}{2}$ shares.

Mr. Jordan: No point will be raised that in the spring of 1940 he received $622\frac{1}{4}$ shares?

Mr. Ferguson: That is right, I can stipulate to that.

Mr. Jordan: He presently stands of record on the books of the company as the owner of $622\frac{1}{4}$ shares.

Mr. Ferguson: Yes. Perhaps we can stipulate this way.

Mr. Jordan: Are those figures so stipulated?

Mr. Ferguson: You have them right there, Gladys M. Shores is the holder of certificate 194, $303\frac{1}{2}$ shares, and Harold M. F. Behneman is the holder of certificate 186 for 470 shares, and certificate 187 for $152\frac{1}{4}$ shares, which is $622\frac{1}{4}$ shares.

Mr. Jordan: Those respective holdings of Mrs. Shores and Dr. Behneman represent 50 of their original holdings in the [434] company?

Mr. Ferguson: Yes, or their predecessors in interest.

The Court: I will continue the trial until two o'clock and give you an opportunity to look over your notes.

(A recess was here taken until two o'clock p. m.)

[435]

Afternoon Session—2:00 O'clock

The Court: You may proceed.

Mr. Jordan: In order to expedite matters, your Honor, I am going to ask counsel for some further stipulations in order that we may get the basic facts in the record.

Mr. Ferguson, from the date of the confirmation of the Hendy reorganization plan on March 24, 1936, or at least shortly thereafter, the board of directors of the Joshua Hendy Company consisted of five directors, did it not?

Mr. Ferguson: Yes, all the time.

Mr. Jordan: And the plan, as a matter of fact, so specified, and the number of five continued right up to the present time?

Mr. Ferguson: There were some vacancies that were filled, that is all.

Mr. Jordan: The defendants Mayman, Moores and Price were directors of The Joshua Hendy Iron Works from April 8, 1936 until March 17, 1941; will you so stipulate, that the defendants Mayman, Moores and Price were directors of the Joshua

Hendy Iron Works from April 8, 1936, to March 17, 1941?

Mr. Ferguson: Yes, that is true.

Mr. Jordan: That will be so stipulated?

Mr. Ferguson: Yes.

Mr. Jordan: Will you stipulate that the defendants Mayman and Moores were on April 8, 1936, nominated under paragraph 7 of the plan to the board?

Mr. Ferguson: That is right, by the Class C creditors, that is, notes secured by real property, and D creditors, notes otherwise secured, those were to nominate three of the directors, and those were two of the three. [436]

Mr. Jordan: And the Bank of California was the largest secured creditor?

Mr. Ferguson: About 95 per cent, and also about 85 per cent. of the unsecured.

Mr. Jordan: And on April 8, 1936 the defendant Price was nominated to the board by the unsecured creditors?

Mr. Ferguson: That is true, under the plan of reorganization the secured creditors were to elect three directors and the unsecured one. The Bank of California was the largest unsecured creditor, but the plan provided that he should be nominated as a representative of some creditor other than the Bank of California, so he was elected to represent the unsecured.

Mr. Jordan: Will it be stipulated that the de-

defendant Bassick was a director from March 15, 1937 until March 17, 1941?

Mr. Ferguson: That is so stipulated.

Mr. Jordan: Will it be stipulated that Mr. Bassick was nominated to the board by the secured creditor classes B, C and D?

Mr. Ferguson: Well, he filled a vacancy from those classes; whether he was nominated separately, I don't know. I guess that is correct.

Mr. Jordan: Will it be stipulated that the defendant Mr. Webber was living and acting as a member of the board at the time that the plant was sold on or about November 15, 1940?

Mr. Ferguson: Yes, he was.

Mr. Jordan: And he, likewise, was elected as a member of the board on March 15, 1937, and he continued to act as a member of the board until his death, sometime early in the year?

Mr. Ferguson: That is true. He was the representative of the stockholders of the debtor and appointed by them.

Mr. Jordan: Will you stipulate that Bassick, Hyland and [437] Levit were likewise employees of The Joshua Hendy Iron Works continuously from March 24, 1936 until about November 15, 1940, when the plant at Sunnyvale was sold?

Mr. Ferguson: That is true of Mr. Levit and Mr. Hyland. Mr. Bassick was the trustee, and I do not believe that legally he was an employee. He was trustee up till January, 1937, and thereafter he was employed and subsequently became president, I believe on March 16, 1937.

Mr. Jordan: In any event he could be characterized as an employee of the company from January 27, 1937 until the sale of the plant in November, 1940?

Mr. Ferguson: Yes, I believe that is true.

Mr. Jordan: Now, Mr. Hyland and Mr. Levit were elected as vice-presidents of the Hendy Company on April 22, 1936, were they not?

Mr. Ferguson: Mr. Morris Levit was vice-president in charge of sales, appointed on April 20, 1936, and Mr. Hyland vice-president in charge of manufacture.

Mr. Jordan: And they continued to hold this office, not only during the time of reorganization, but up to March 15, 1941?

Mr. Ferguson: I cannot stipulate as to that, because I understand Mr. Levit was employed by the purchaser of the plant in an additional capacity, and Mr. Hyland, I don't know whether he left when the plant was sold, or worked for a short while and left. I don't know in what capacity he was employed.

Mr. Jordan: I am referring to Mr. Hyland and Mr. Levit after the sale of the plant in November, 1940, only as officers of the company, in the sense that they continued to act as vice-presidents of the company in charge of sales and in charge of manufacture up to March 15 of this year.

Mr. Ferguson: I think that is correct. [438]

Mr. Jordan: Mr. Bassick was president of the company from March 15, 1937 to March 17, 1941.

Mr. Ferguson: Yes, that is correct.

Mr. Jordan: And the defendants Mayman, Moores, Price, Webber, and Bassick were directors of the Hendy Company continuously from March 15, 1937, to March 17, 1941, or at least up to the termination of the voting trust created by the plan on or about the 21st of December, 1940, and were acting as voting trustees under the plan, as well as directors.

Mr. Ferguson: Yes. The plan provides that the board of directors as made up from time to time constitute voting trustees; they were not already voting trustees, but as they succeeded to directors they automatically became voting trustees.

Mr. Jordan: But it is stipulated they were continuously directors of the company during that period, and likewise were voting trustees.

Mr. Ferguson: That is true, except Mr. Webber ceased to act sometime in December, before his death.

Mr. Jordan: Now, as such voting trustees the defendants Mayman, Moores, Price, Webber and Bassick on the 20th of December of last year held 2212½ shares of the capital stock of the Hendy Company, which represented 50 per cent. of the outstanding shares of 4425 shares at the time the plan was confirmed?

Mr. Ferguson: I do not follow your stipulation.

Mr. Jordan: I will reframe it. It has already been stipulated that Mr. Mayman, Mr. Moores, Mr. Webber, Mr. Price and Mr. Bassick were voting

trustees, constituted as such on the plan by reason of the fact that they were directors of the Hendy Company from March 15, 1937 up to the date of the termination of the voting trust on December 21, 1940: That is correct, is it [439] not?

Mr. Ferguson: Yes.

Mr. Jordan: During the period commencing with March 24, 1936, when this court approved the plan of reorganization of The Hendy Company and thereafter as they became directors they likewise became voting trustees and holders of 50 per cent. of the outstanding stock of the company which was surrendered to them as voting trustees under paragraph 6-G of the plan?

Mr. Ferguson: No, that is not correct. I think you are under a misapprehension. The fact is that the stock, most of it was surrendered and they became holders of all of the stock as voting trustees. 50 per cent. of it was deposited by the stockholders and held in trust, and 50 per cent. under 6G-2 was held for distribution. They did not hold all of that stock, because, as you know, Dr. Behneman held some 1244½ shares of stock and did not surrender his stock until last year.

Mr. Jordan: June, 1940.

Mr. Ferguson: That is correct.

Mr. Jordan: In any event, in June, 1940, those gentlemen, as voting trustees, were holding a total of 2212½ shares.

Mr. Ferguson: Yes.

Mr. Jordan: And out of this number of shares

622 $\frac{1}{4}$ represented stock belonging to Dr. Behneman, and 303 $\frac{1}{2}$ represented shares surrendered by Mrs. Shores.

Mr. Ferguson: Yes.

Mr. Jordan: Will you stipulate on November 4, 1940, the Hendy Company granted an option to McDonald & Kahn, Inc., for the purchase of the Sunnyvale plant of the company, together with all equipment situated in the plant, and materials on hand for a total basic price of \$426,000? [440]

Mr. Ferguson: Substantially that is true. I think the option is the best evidence of what it was.

Mr. Jordan: If you want to put the option in I have no objection, but if that is substantially true will you so stipulate?

Mr. Ferguson: Yes, I will. The only variance that there might be would be certain deductions to be made between the parties by reason of pending adjustments.

Mr. Jordan: That option would have expired at noon on November 15, 1940.

Mr. Ferguson: I believe so. Anyway, it was exercised before it expired.

Mr. Jordan: The option was granted pursuant to a resolution of the board of directors on November 4, 1940?

Mr. Ferguson: Yes, I believe so. It is all of record.

Mr. Jordan: If there is any question about it——

Mr. Ferguson: No, that is correct. I will so stipulate.

Mr. Jordan: Will you stipulate that at the time that this option was granted on November 4, 1940 for the sale of the Sunnyvale plant, that no member of the board of directors was at that time a stockholder of the company?

Mr. Ferguson: No I won't stipulate to that. Two of them represented the second largest stockholder; I refer to Mayman and Moores. The Bank of California was and always has been since the reorganization the second largest stockholder.

Mr. Jordan: Mr. Mayman and Mr. Moores having been nominated by the Bank of California to the board some years ago.

Mr. Ferguson: That is correct.

Mr. Jordan: They continued to act on behalf of the Bank of California?

Mr. Ferguson: That is true. [441]

Mr. Jordan: As individuals they did not hold any stock. Mr. Bassick was not a stockholder, nor was Mr. Price, nor Mr. Webber on that date, was he?

Mr. Ferguson: I don't know about Mr. Webber—the other two did not. I believe Mr. Webber either held it, himself, or it was in his wife's name, I have forgotten which.

Mr. Jordan: Would it be too much trouble to refer to the record?

Mr. Ferguson: On November 4 I believe there was stock standing in the name of his wife and other of his relatives, but it was subsequently trans-

ferred to his name as an interest in his wife's estate, but I do not think it was on November 4.

Mr. Jordan: Then it will be stipulated, Mr. Ferguson, that as an individual no member of that Hendy board on November 4, 1940 was the owner of any stock?

Mr. Ferguson: Not of record, no. That is all I can stipulate to.

Mr. Jordan: Now, this morning you stipulated that there was to be paid under the deferred payment plan set up in the plan of reorganization \$569,969. That was your figure, and I accepted it. The plan specified \$549,317, of course that is 1935, and I accepted the figure of \$569,969. That figure was the amount that was to be paid in accordance with the provisions of the plan to the creditors' account.

Mr. Ferguson: The principal amount.

Mr. Jordan: Will you stipulate that of that figure \$569,969, \$274,966.57 still remained unpaid on November 4, 1940?

Mr. Ferguson: Yes, that is right. That is the principal amount.

Mr. Jordan: Will you stipulate that on or about November [442] 15, 1940, McDonald & Kahn, Inc., or Felix Kahn, as assignee, exercised that option?

Mr. Ferguson: Felix Kahn, as Trustee, exercised that option.

Mr. Jordan: Will you stipulate that on November 15, 1940, at a special stockholders' meeting, the vot-

ing trustees controlling all of the outstanding stock voted their approval of the sale?

Mr. Ferguson: There were three meetings held, one of the voting trustees, and they ratified it; one of the stockholders, and they ratified it, and one of the directors, and they ratified it.

Mr. Jordan: Will you stipulate that the sale of the Sunnyvale plant was thereupon, or shortly thereafter, consummated and title transferred to the purchaser of the plant?

Mr. Ferguson: It was consummated with this reservation, because of the work in progress it could not be done, but substantially it was consummated and title was passed at that time.

Mr. Jordan: Will you stipulate that on or about November 19, 1940, the Hendy Company received payment of a portion, at least, of the consideration to be paid for that plant?

Mr. Ferguson: I do not have that figure available. They did receive payment of a portion, but the balance is subject to adjustment.

Mr. Jordan: Have the adjustments been completed to this date?

Mr. Ferguson: No.

Mr. Jordan: Are you able to furnish the total amount that has been paid on account of the purchase price to The Hendy Company on December 20, 1940?

Mr. Ferguson: That will have to be computed. I do not have the figures. We can compute it and we can have it for you tomorrow, subject to such ex-

planation, of course, as we desire to [443] make in the record.

Mr. Jordan: Will you stipulate that the Sunnyvale plant and equipment of The Joshua Hendy Iron Works on November 15, 1940 constituted all of the operating assets of the company?

Mr. Ferguson: That, I think, is asking for a stipulation of a legal conclusion. I would say that it was substantially all operating, but whether there was any property or not I don't know.

Mr. Jordan: Let me ask you if you will stipulate to this, would you stipulate that upon consummation of the sale of the Sunnyvale plant and the transfer of the title, that thereafter The Joshua Hendy Iron Works' only remaining assets consisted of cash in bank, accounts receivable, and a lot situated in San Francisco in North Beach, a Nash automobile, and some office furniture in the San Francisco office?

Mr. Ferguson: I cannot so stipulate. That is substantially it, but there were other investments of a minor nature they had, of doubtful value, of questionable value. I cannot so stipulate. I will say of what there was substantially that is the bulk of it.

Mr. Jordan: Will you stipulate with the exception of the plant at Sunnyvale the Hendy Company neither owned or operated any other factory?

Mr. Ferguson: That is right.

Mr. Jordan: And that their business, as far as the manufacturing part was concerned, was conducted at the Sunnyvale plant?

Mr. Ferguson: That is true.

Mr. Jordan: Will you also stipulate that as a part of the option agreement it was provided that if the option were [444] exercised and the sale of the plant consummated that the Joshua Hendy Iron Works would have to thereafter discontinue the use of that name.

Mr. Ferguson: In other words, they bought the name together with the business.

Mr. Jordan: Yes. Will you stipulate at the meeting of the directors held on November 19, 1940 a resolution was adopted authorizing the change of the corporate name to Hendy Realization Company?

Mr. Ferguson: That is correct, I will stipulate to that. A stockholders meeting was held the same day approving the directors' action.

Mr. Jordan: And thereafter proceedings were instituted which brought about the legal change in name?

Mr. Ferguson: Correct, completed on December 2.

Mr. Jordan: Now, within the period between November 15, 1940 and December 31, 1940, all of the \$274,965.57 which was still owing creditors under the plan was fully paid, was it not?

Mr. Ferguson: That is correct.

Mr. Jordan: Will you stipulate that at a meeting of the board of directors of the company held on December 4, 1940, additional compensation for the year 1940 was voted to the defendants, Bassick, Hyland and Levit in the following amounts: Mr.

Bassick \$40,000; Mr. Hyland, \$20,000; Mr. Levit \$20,000?

Mr. Ferguson: No, I won't so stipulate. That was not the fact. The fact was, and the resolution shows that that was voted to them, not for 1940, but for the entire time from the time of reorganization, from March, 1936, and the resolution so shows.

Mr. Jordan: I propose to introduce that resolution later, [445] Mr. Ferguson, and in any event it will speak for itself.

The Court: If you have it why don't you introduce it now?

Mr. Jordan: I am about to read, if counsel permits, from the sworn answer to interrogatories propounded by respondents Behneman and Shores in this matter sometime ago.

The Court: I am wondering if the record is not here.

Mr. Jordan: I am perfectly willing to read it from the minute book. I assume that these, having been prepared by counsel, would be correct.

Mr. Ferguson: That is an exact copy. I would like to inquire what the purpose of this line of inquiry is, because these payments are not involved in this case. Counsel has another suit, as I stated, pending in the State Court.

Mr. Jordan: I believe that the court will be interested in knowing exactly what became of the proceeds of the sale of the plant, and I propose to connect this later on by showing that the only way that they could have paid \$300,000 on December 4,

1940, was by resorting to the proceeds of the sale of the plant; in other words, a sale of the capital assets. This money did not come out of earnings; it could not have, because they did not have enough on hand to pay it. We expect to prove they dipped into the proceeds of the sale of the plant to pay off \$274,000 odd that they still owed under the provisions of the plan which were to entirely mature in a matter of four or five months. Therefore, I think it is highly material to the court, and your Honor so ruled when you overruled the objections to that interrogatory.

The Court: Do you make that as an objection?

Mr. Ferguson: I object, in the first place, to this line of inquiry on the ground that the bonuses are not here involved. We have no desire to deprive the court of all the facts, but we [446] must not try other cases with this case. The second point is, this claim is going to involve an accounting of that year to determine where the money came from to pay that.

The Court: How are you going to ascertain that without examining the books?

Mr. Jordan: I believe that I can establish by evidence that if the proceeds of the sale of their particular assets had not come into the company it would have been impossible for them to have declared a bonus or additional sums of \$103,000 and at the same time, within a matter of days, also paid off all the remaining obligations under their plan of reorganization.

The Court: I will overrule the objection. You are now going to read from the answer to the interrogatories.

Mr. Jordan: In which, your Honor, this resolution that we have been discussing of December 4, 1940, which declared this extra compensation, is set forth.

The Court: You may read it.

Mr. Jordan:

“The President stated that the first business of the meeting was the consideration of Mr. Moores’ suggestion under advisement at the previous meeting, and the various proposals presented at the meeting of the Board of Directors on December 2, 1940, relative to the compensation of certain of the officers and employees of the corporation. Further discussion upon the matter was thereupon had, at the conclusion of which it was moved by Director C. B. Moores, seconded by Director A. Webber, and unanimously carried—Director W. R. Bassick, however, expressly not participating in said vote—that the following resolution be adopted (expressly, however, without prejudice to the right of the Board, acting as Voting Trustees pursuant to [447] the confirmed plan of reorganization of the corporation, to further reward the managing officers of the corporation for their services by the distribution of capital stock of the corporation as provided, inter alia,

in Paragraph G-2 of said plan of reorganization):

“ ‘Whereas, the financial position, business, and affairs of this corporation have, since its reorganization, evidenced steady and substantial improvement to the point that they have become sound, businesslike, and satisfactory in condition; and

“ ‘Whereas, the achievement of this fact has been made possible only by the unselfish and unremitting efforts and diligence of certain of its officers and employees since its reorganization; and

“ ‘Whereas, throughout this entire period, this corporation has not paid such officers and employees for their services in accordance with the full value thereof to this corporation, but said officers and employees have been paid therefor and have accepted substantially less than the value of their said services to this corporation in consideration of the fact, and upon the representation of this Board of Directors, that a further payment, which with the amount already paid, would constitute a fair payment therefor, would be made at a later but the earliest expedient date; and

“ ‘Whereas, the affairs and position of this corporation are now such that said officers and employees can be paid for their said services, and it is fair and just that said offi-

cers and employees should be [448] rewarded for their said services and paid therefor, and for the severance of their employment and interference with their vacation and other rights occasioned by the sale of the Sunnyvale plant and properties of this corporation; and

“ ‘Whereas, it appears to be for the best interests of this corporation that the following resolution be adopted:

“ ‘Now, therefore, be it resolved, that this corporation forthwith pay the following amounts to the following of the officers and employees of this corporation in recognition, appreciation, payment, and reward for their exemplary and valuable services to this corporation:

W. R. Bassick.....	\$40,000.00
E. M. Hyland.....	20,000.00
M. Levit	20,000.00
C. B. McAulay.....	10,000.00
C. E. Birkenbeul.....	3,000.00
J. M. Brown.....	3,000.00
J. L. Whitehead.....	1,000.00
R. N. Parkin.....	1,000.00
Frank L. McAdam.....	500.00
Margaret Terry	500.00
C. Cortage	500.00
A. R. Sillers.....	500.00
W. C. Theller.....	500.00

R. M. Spedding.....	500.00
L. A. Wall.....	100.00
Grace Miguelgorry	100.00
Juliette del Castillo.....	100.00
Ruth Barbier	100.00
Gerda Mangels	100.00
Thelma Broeder	100.00

“ ‘And be it further resolved, that the officers of this corporation be and they are hereby authorized and directed to take such steps and to make such payments as shall be necessary or desirable to effectuate and carry this resolution into effect.’ [449]

Inasmuch as the following portions of this resolution following are pertinent, I will state them. This is not part of the same resolution just referred to. In the same minutes they refer to the voting to Mr. Bassick of the Nash automobile, which belonged to the company. Will it be stipulated that it was voted to him under this condition, that while the automobile might be useful in the winding up of the affairs of the corporation, so as to avoid the expense of its operation, it was given to him with the understanding that he would keep it up, and title was authorized to be passed to Mr. Bassick.

Mr. Ferguson: In that connection, the minutes that have just been read are of an adjourned meeting. the first part of that meeting having been held upon this question, and at some length reported, and

this was an adjourned consideration of that part of the meeting, and at a subsequent meeting held on December 20 two additional names were added, those of William Vierra, \$250, and Willard Plummer, \$250, as having been omitted from the list in the resolution. I might point out in that connection that it shows that these services that they were making payment for were services during the entire time, since the plan of reorganization was confirmed.

The Court: Doesn't the resolution say that?

Mr. Ferguson: Yes, if your Honor please.

The Court: Maybe Mr. Jordan will stipulate to that fact.

Mr. Jordan: Are you referring to the resolution which I have just read?

Mr. Ferguson: Yes.

Mr. Jordan: That will speak for itself.

Mr. Ferguson: That will be subject to proof on our part if you won't stipulate to it. [450]

Mr. Jordan: Will you stipulate, Mr. Ferguson, that the total amount of the bonus declared on December 4, 1940, in the amount that I have just read, in extra additional compensation at that time was \$102,729.76?

Mr. Ferguson: Whatever the figure is.

Mr. Jordan: If you are not satisfied with that figure I want you to verify it; if that is correct I will ask for a stipulation.

Mr. Ferguson: You have read the figures in, and

subject to the amendment of \$500 additional on December 20th, whatever your total is is satisfactory.

Mr. Jordan: Now, on this subject of bonuses or additional compensation, we will direct the court's attention to the fact that that \$102,729 was for services only in 1940, not for previous years following the approval of the plan. Will you stipulate that the annual meeting of stockholders and creditors of the corporation held on March 21, 1938 additional compensation in the total amount of \$6000 was awarded to various employees of the company for the year 1937?

Mr. Ferguson: \$6000 total.

Mr. Jordan: As far as Mr. Bassick was concerned, he at that time received additional compensation of \$1800, did he not?

Mr. Ferguson: That is correct.

Mr. Jordan: As far as Mr. Hyland is concerned, he at that time received additional compensation of \$1200.

Mr. Ferguson: When I stated that is correct, I say that is what the resolution authorized. I am presuming it was paid.

Mr. Jordan: Are you in a position to stipulate that it was?

Mr. Ferguson: No, not without referring to the books.

Mr. Jordan: As far as the resolution is concerned, Bassick [451] \$1800, Hyland \$1200, Levit \$1200.

Now, I refer you to the annual meeting of stockholders held on March 20, 1939. Was there a board of directors meeting held on the same day?

Mr. Ferguson: Yes, there was.

Mr. Jordan: Will you stipulate that at that meeting a resolution was adopted whereby it was determined that Mr. Bassick and Mr. Hyland were to receive, commencing January 1, 1939, \$100 per month increase each in salary?

Mr. Ferguson: It so states in the minutes, yes.

Mr. Jordan: And at the same time Mr. Levit was allowed \$600 additional compensation for 1938, and additional compensation to other parties.

Mr. Ferguson: Perhaps it would be better for you to read the resolution.

Mr. Jordan:

“Mr. Bassick requested of the board authority to pay extra compensation where deserved, as a partial recognition of the work accomplished, especially in connection with the Grand Coulee Gate job. It was moved by Mr. Price and seconded by Mr. Mayman that the extra compensation be paid to the following employees in the amount set opposite each name, and salary increases from January 1, 1939 of \$100 per month be made to W. R. Price and E. M. Hyland, all subject to the approval of the absent director, Mr. Moores. W. Vierra \$100, M. Levit \$600, C. Birkenbuel \$150, C. McAulay \$150, J. Whitehead \$150, V. Kowell

\$250, A. Sillers \$100, R. Spedding \$150, W. Theller \$150." A total of \$1800.

"The motion was unanimously adopted. Mr. Bassick expressed the desire to bring the question of extra compensation up again for further consideration before the first of the coming [452] year."

Now, I will call your attention to the meeting held on—this would be the annual meeting of stockholders and creditors held on March 18, 1940, and ask if you will stipulate that a resolution was adopted at that meeting ratifying and approving the previous payment by the corporation on December 20, 1939 of bonuses as follows: Mr. Bassick \$2000——

Mr. Ferguson: A stockholders meeting?

Mr. Jordan: It may be a directors meeting, it is a meeting on that date.

Mr. Ferguson: There was a directors meeting on the same day. There was a resolution passed at the directors meeting, not the stockholders meeting.

Mr. Jordan: Does that resolution provide for the payment of additional compensation for that year, 1939, to Mr. Bassick of \$2000, Mr. Hyland \$1000, Mr. Levit \$450—the resolution reads as follows:

"The payment by the corporation on December 20, 1939 of the following bonuses totaling \$6000, and an increase in the salary of Mr. Levit of \$50 per month was approved on mo-

tion made by Mr. Price, seconded by Mr. Webber, and unanimously carried.”

Then follows “W. R. Bassick \$2000, E. M. Hyland \$1000, M. Levit \$450, Margaret Terry \$250, C. B. McAulay \$350, J. L. Whitehead \$300, C. E. Birkenbeul \$250, R. N. Parkin \$225, D. G. Burdick \$25, J. M. Brown \$200, F. L. McAdam \$50, L. A. Wall \$25, V. D. Kowell \$300, A. R. Sillers \$150, W. C. Theller \$150, R. M. Spedding \$150, W. G. Vierra \$100, W. K. Plummer \$25,” and that is totaled at \$6000.

The Court: Is that in addition to the allowance of ad- [453] ditional compensation in 1939?

Mr. Ferguson: That was all compensation in 1939, additional compensation; that is exclusive of the amount that was declared in 1940.

Mr. Jordan: There were two declarations in 1940. In the spring of 1940 there was a declaration under the resolution just read for the year 1939. The payment was in 1940; then there was a further declaration of a larger amount in the total sum of \$103,000 on December 4, 1940.

The Court: The additional compensation amounted to \$6000 for 1939?

Mr. Ferguson: It was declared in 1940 for the year 1939. Apparently, according to the minutes, it was paid in 1939. This is the first meeting they had and they approved of that.

Mr. Jordan: That was a ratification of the payment.

The Court: Ratification of the \$6000 payment?

Mr. Jordan: That is right. So we can summarize this matter of compensation, as far as Mr. Bassick, Mr. Hyland, and Mr. Levit are concerned, will you stipulate, Mr. Ferguson, that during the period from March 24, 1936, the date on which the plan of reorganization of this company was confirmed, to December 31, 1940 Mr. Bassick was paid by the Hendy Company inclusive of salary and bonuses the following yearly amounts: March 24, 1936 to December 31, 1936, \$6000; for the year ending December 31, 1937, \$7200; for the year ending December 31, 1938, \$9000; for the year ending December 31, 1939, \$10,100; and for the year ended December 31, 1940, \$50,801.82, or a total compensation during that period paid by the company to Mr. Bassick of \$83,101.82?

Mr. Ferguson: That is the answer to your Interrogatory No. 7, [454] and I believe that answer is right. It says, "The salary and other compensation exclusive of capital stock paid to W. R. Bassick as an officer and employee of the corporation, during the following periods were"—

Mr. Jordan: All I am asking is whether or not it is true those amounts were paid.

Mr. Ferguson: That is true.

Mr. Jordan: And the total amount paid to Mr. Bassick was \$83,101.82?

Mr. Ferguson: I did not add it up.

The Court: That is a matter of computation.

Mr. Jordan: Will you stipulate, as far as Mr.

Levit is concerned, that inclusive of salary and extra compensation for this same period, March 24, 1936 to December 31, 1940, that he in each year during that period received the following amounts: For the period from March 24, 1936 to December 31, 1936, \$4000; For the year ended December 31, 1937, \$4800; For the year ended December 31, 1938, \$6000; For the year ended December 31, 1939, \$6000; And for the year ended December 31, 1940, \$24,717.50?

Mr. Ferguson: Yes, I will stipulate that was his salary and other compensation.

Mr. Jordan: And the total of those amounts paid during that period to Mr. Levit was \$45,517.50?

Mr. Ferguson: Yes.

Mr. Jordan: And as far as Mr. Hyland is concerned, during this same period will you stipulate that the following amounts were paid annually, inclusive of salary and extra compensation and exclusive of stock dividend, for the year March 24, 1936 to December 31, 1936 \$3500; [455] for the year ended December 31, 1937, \$4775; for the year ended December 31, 1938, \$6000; for the year ended December 31, 1939, \$6700; and the year ended December 31, 1940, \$25,241.67?

Mr. Ferguson: That is correct. I might add, your Honor, that those figures are all taken from the Answer to the Interrogatories on file.

Mr. Jordan: Will you stipulate, Mr. Ferguson, that at a meeting of the board of directors of the Hendy Company held on December 20, 1940, a reso-

lution was adopted by the board authorizing a distribution to Mr. Bassick, Mr. Hyland, and Mr. Levit of the 2212½ shares of the stock of the company held by the board under paragraph 6-G 2 of the plan of reorganization?

Mr. Ferguson: That is correct.

Mr. Jordan: I think perhaps, as in the case of the extra compensation, that we might at this time read into the record the resolution.

The Court: There has been no question about that. Mr. Ferguson has not disputed that there was a resolution with reference to that.

Mr. Jordan: That is very true, but I thought you might like to hear the terms upon which it was done.

The Court: If you want to read it I have no objection.

Mr. Jordan: I am now reading from a resolution of the board of directors adopted on December 20, 1940:

“Upon motion duly made, seconded, and unanimously carried, Director W. R. Bassick, however, expressly not participating in the vote, the following resolution was adopted:

“ ‘Whereas, under the terms of the confirmed plan of reorganization of this corporation and the Voting Trust created [456] pursuant thereto, 2212½ shares of the capital stock of this corporation are now held by this Board, as Voting Trustees, free and clear of any claim, right, title, or interest therein by the former

stockholders surrendering the same, and subject to the distribution by this Board, in its sole discretion, either in whole or in part to the managing officers of this corporation as a reward for their management and the successful rehabilitation of the corporation's affairs; and

“ ‘Whereas, the officers of this corporation hereinafter named have, since its reorganization, rendered extremely valuable services to, and in the management of, the corporation, resulting in its rehabilitation as a sound and going business, and the improvement of the financial condition of the corporation from a point where the stockholders of the corporation had no equity, as evidenced by the records of the reorganization of the corporation under Section 77B of the Bankruptcy Act, to a point where the equity of the stockholders has become very substantial;——”

I would like to interrupt at this point, if your Honor please, to point out to your Honor that this resolution was adopted on December 20, 1940, a matter of something over a month following the sale of the Sunnyvale plant, and receipt of the purchase price. Now, proceeding:

“ ‘and

“ ‘Whereas, the financial position, business, and affairs of this corporation have, since its reorganization, evidenced steady and substantial improvement to the point that they have be-

come rehabilitated, sound, business-like, and satisfactory in condition, and such rehabilitation of the corporation's business so occasioned has made possible the advantageous sale of [457] the Sunnyvale plant and properties of the corporation just consummated; and

“ ‘Whereas, notwithstanding the value of such services to this corporation, the compensation of such officers has not been commensurate therewith, and this Board, through its Directors, has repeatedly represented to such officers that the compensation received by them during said period would be supplemented by additional reward as soon as in the opinion of the Board such further reward was practical and expedient; and

“ ‘Whereas, in addition, due to the sale of the corporation's Sunnyvale plant and the properties, the employment of certain of said officers has necessarily been severed, and their vacation and other rights interfered with; and

“ ‘Whereas, it appears just and proper that said 2212-1/2 shares of the capital stock of this corporation held by this Board, as aforesaid, be issued to said managing officers, subject to the condition hereinafter set forth, as a reward for their successful management and rehabilitation of the corporation's affairs; and it appears to be for the best interests of this corporation that the following resolution be adopted:

“ ‘Now therefore, be it resolved, that this Board forthwith distribute said 2212-1/2 shares of the capital stock of this corporation so held by it to the following persons in the respective amounts hereinafter set forth, in recognition, appreciation, payment, and the reward for their exemplary and valuable services to this corporation and as a reward for their management and the successful rehabilitation of the corporation’s affairs:

W. R. Bassick	812-1/2 shares
E. M. Hyland	700 shares
M. Levit	700 shares;

[458]

provided, however, that each such person shall, prior to, and as a condition precedent to, receiving such distribution of stock, waive in writing the right of such person to receive any dividends or distribution upon said stock out of the first \$85,848.75 available for dividends or distribution upon the capital stock of this corporation, in dissolution or otherwise, so that the said sum of \$85,848.75 may be prorated and paid by way of dividend, distribution, or otherwise (or set aside for such payment), only to the holders of the remaining 1907-3/4 shares of the outstanding stock of the corporation now held by this Board as Voting Trustees, to the end that said persons holding said 2212-1/2 shares hereby distributed shall only participate in dividends or distributions upon

the capital stock of this corporation made in excess of said sum of \$85,848.75, as aforesaid.

“ ‘And be it further resolved, that the President or Vice-President and the Secretary or Assistant Secretary of this corporation be and they are hereby authorized and directed, for and on behalf of this Board, to take all such steps and to execute all such documents as may be necessary or desirable to effectuate the distribution, transfer, and delivery of said stock to said officers, as aforesaid, and to fully effectuate the purposes of this resolution.’ ”

It will be stipulated, Mr. Ferguson, that the stock was distributed subsequently to Mr. Bassick, Mr. Hyland, and Mr. Levit in accordance with that resolution?

Mr. Ferguson: That is correct, upon their first executing waivers of any right to participate in \$85,848.75 distributed by way of liquidating dividends, that is equal to \$45 a share to the other stockholders. [459]

Mr. Jordan: I am going to ask you *to ask you* to refer to a stockholders meeting also held on December 20, 1940, immediately subsequent to the directors meeting at which that last resolution I just read was adopted. Now, referring to your minute book, will you stipulate that at the time of that meeting there were outstanding shares of the Hendy Company in the total amount of 4120-1/4 shares?

Mr. Ferguson: I believe that is correct, yes.

Mr. Jordan: The differential or reduction from 4425 shares which were outstanding at the time the plan was confirmed to 4120-1/4 came about by reason of the acquisition by the company of 305-3/4 shares from Mrs. Albertie M. Hendy, in the spring of 1940, in settlement of indebtedness that she had with the incorporation?

Mr. Ferguson: That is right, it was a compromise.

Mr. Jordan: And that 305-3/4 shares was completely extinguished and retired?

Mr. Ferguson: Cancelled.

Mr. Jordan: Will you stipulate that at this stockholders meeting of December 20, 1940, that the entire outstanding stock was represented in this respect: That the 1907-3/4 shares in which the old stockholders of the company had a beneficial interest were present through the voting trustees of the company, who were also directors, and that the 2212-1/2 shares which had previous to the directors meeting been distributed to Mr. Hyland, Mr. Bassick and Mr. Levit were represented by those gentlemen at that meeting?

Mr. Ferguson: That is correct.

Mr. Jordan: And all of the stock being present, with voting power, a resolution was adopted approving and ratifying all acts [460] and proceedings of the board of directors and officers of the company since the last previous annual meeting of the board held on March 18, 1940?

Mr. Ferguson: Yes, that is right.

Mr. Jordan: Will it also be stipulated that that was the same meeting of stockholders of December 20, 1940 in which a resolution was adopted authorizing the appropriate officers to commence proceedings for the dissolution of the Hendy Realization Company?

Mr. Ferguson: Yes, that was the first step in the winding up and dissolution of the corporation.

Mr. Jordan: Those dissolution proceedings are pending at this date, are they not?

Mr. Ferguson: The first certificate was filed, but no final action can be taken until the company's liabilities have been adjusted and final distribution of the assets.

Mr. Jordan: Will you stipulate that at a meeting of the voting trustees on December 21, 1940, the following day, a resolution was adopted terminating the voting trust created by the plan of reorganization, and authorizing that the voting trust certificates in the hands of old stockholders be called in and that new stock certificates evidencing the same amount of the voting trust certificates be delivered to the holders?

Mr. Ferguson: I will agree that in that resolution, which is rather lengthy, it recites the fact that under the plan of reorganization the voting trust was to terminate in five years and thereafter until all of the obligations had been paid. This was prior to that time and it was pointed out that all of the obligations had been paid or would have been paid

prior to that time and that therefore the voting trust should terminate and that the shares held in trust should be returned upon surrender of the [461] voting trust certificates held by them.

Mr. Jordan: There was also a directors meeting of the same date, was there not, December 21, 1940, at which a resolution was adopted authorizing payment of a first liquidating dividend of \$45 a share in favor of the beneficial owners of 1907-3/4 shares?

Mr. Ferguson: I will agree there was a directors meeting at which they moved that the trust be terminated, and upon its termination on the payment of all obligations they directed the payment of a liquidating dividend of \$45 per share be distributed to only 1907-3/4 shares and expressly not to go to the three officers who had received stock by reason of the fact——

Mr. Jordan: Just a moment, we are not arguing. I am asking for a stipulation.

Mr. Ferguson: That far I will stipulate.

Mr. Jordan: The total amount of that liquidating dividend so declared was \$85,848.75.

Mr. Ferguson: That is correct.

Mr. Jordan: That was so paid?

Mr. Ferguson: Yes.

Mr. Jordan: Will you stipulate that after the annual meeting of stockholders held on March 17, 1941, the following were elected as members of the board of directors——

Mr. Ferguson: We stipulated to that this morning.

Mr. Jordan: Mr. Ferguson, I am going to ask you for one further stipulation—I do not know whether you will be able to give it to me or not. Are you able to furnish the amount of cash on hand and the total amount of accounts receivable on the books of the company immediately prior to the sale of the Sunnyvale plant on November 15, 1940?

Mr. Ferguson: No. [462]

Mr. Jordan: You cannot do it?

Mr. Ferguson: No.

Mr. Jordan: Can you give me the total cash on hand on December 31, 1940?

Mr. Ferguson: It shows cash on December 31, 1940, \$9766.71, accounts receivable and notes receivable \$51,211.28, and current assets of that date of \$154.75, making a total as of December 31, 1940 of \$61,132.74. That, of course, is after all distributions had been made.

Mr. Jordan: That money was left after payment of the \$274,000 odd that was owing to the creditors under the plan of reorganization at the time of the sale and also after payment of the total of \$103,000, or thereabouts, on additional compensation declared in December.

Mr. Ferguson: That is right, and also after the payment of the \$45 dividend.

Mr. Jordan: But you cannot furnish me with the amount of cash on hand at November 15, 1940?

Mr. Ferguson: No. The only audit I have would be taken from the books.

Mr. Jordan: I would like to have the figure before the purchase price money was paid.

Mr. Ferguson: The nearest balance sheet I have, is as of September 30, 1940.

Mr. Jordan: Will you stipulate, Mr. Ferguson, that unless the sale of the Sunnyvale plant had been effected on or about November 15, 1940, it would have been impossible for the company to have declared and to pay additional compensation to employees and officers on December 4, 1940?

Mr. Ferguson: No. [463]

Mr. Jordan: Will you stipulate that during the period from March 24, 1936 to date the stockholders of the Hendy Company have never been paid any earned dividends?

Mr. Ferguson: I do not think they ever have in the entire history of the company, Mr. Jordan.

Mr. Jordan: That at least goes during the period I have just mentioned. Will you stipulate to this, Mr. Ferguson, that it would have been impossible in November or December, 1940, or at any time up to March 24, 1941, which would have been five years from the date of the confirmation of the plan, for the company to have paid the \$274,000 odd, stipulated under the plan, except for the sale of the Sunnyvale plant?

Mr. Ferguson: I will not stipulate to that.

Mr. Jordan: Mr. Ferguson, is Mr. Bassick here in court?

Mr. Ferguson: No, he is not.

Mr. Jordan: Do you represent him?

Mr. Ferguson: I do.

Mr. Jordan: Do you expect him to be here during the course of the trial?

Mr. Ferguson: No, I do not. I am not advised of Mr. Bassick's whereabouts, or where I could locate him. Mr. Bassick has for a considerable period of time been in very poor health, and has to be assisted in everything that he does; and because we believe that everything that he could have testified to has been proved we could not contemplate calling him, on account of his very poor health.

Mr. Jordan: There are certain matters which I believe to be pertinent in this case which could only be testified to by Mr. Bassick. Mr. Bassick, as I understand it, lives in Mill Valley, but he has been on an extended trip for some months. I say that [464] advisedly, because we have attempted to serve him with process during several months' period. In talking with Mr. Ferguson over the 'phone as to when he would return from this extended trip, Mr. Ferguson told me that he was doubtful that he would be able to appear in court. I told him that I wanted him to be here, and that I would insist on his being here, unless he physically was unable to and a doctor could so certify. I have had a subpoena issued for him, that has been sent over to Mill Valley, and we are informed that Mr. Bassick has again left town on a trip, to be gone for a week or so. Mr. Bassick is a party to this action and he has knowledge and possession of facts that I think are material to this case. We want to call him as a

witness if it is humanly possible, but every effort on our part to get him through legal process has failed. You do not know where he is?

Mr. Ferguson: No, I do not. Mr. Jordan asked me if I would have him here, a week or so ago, and I advised him I would not, that on account of his physical condition he would be unable to testify as a witness, but I told him all the other officers would be here to testify, and he said that he was not satisfied, and I told him he would have to take such steps as were available to him. I do not know where he is now.

Mr. Jordan: I have done everything I could do through legal process to bring him in. Of course, I could not serve him if he is not available to be served. Do you think, Mr. Ferguson, that it would be absolutely impossible for you to communicate with him?

Mr. Ferguson: I am positive of that. We have no knowledge of where to communicate with him.

Mr. Jordan: We will call Mr. Levit. [465]

MORRIS LEVIT,

Called for the Plaintiff and Respondent; Sworn.

Mr. Jordan: Q. Mr. Levit, you are the Morris Levit that was referred to in various stipulations here? A. Yes.

Q. You are one of the defendants in this matter?

A. Yes, I am.

(Testimony of Morris Levit.)

Q. And you are one of the petitioners?

A. Yes.

Q. You are the Mr. Levit who acted as a vice-president of the Joshua Hendy Iron Works and later the Hendy Realization Company from April, 1936 until March of this year. Is that correct?

A. Right.

Q. As a matter of fact, you have been associated with The Joshua Hendy Iron Works for many years?

A. Very many years.

Q. Can you tell us how many?

A. Well, next month I will figure up my fifty-second year.

Q. With the company? A. Yes.

Q. At present you are associated, are you not, with the new company of the same name?

A. Yes, I went with them since they took over.

Q. There is at the present time a company, a corporation, a Nevada corporation, incorporated under the name of The Joshua Hendy Iron Works?

A. Yes.

Q. And that corporation is the present owner of the plant at Sunnyvale?

A. That is right.

Q. Formerly owned by the corporation now known as the Hendy Realization Company?

A. That is right.

Mr. Jordan: By the way, your Honor, I would like the record to show that Mr. Levit is being

(Testimony of Morris Levit.)

called pursuant to Rule 43-B of the Rules of Civil Procedure, as an adverse witness.

Q. Now, I do not think we have to go back through the entire four years, but will you state—it is true, is it not, that from [466] 1932, May of 1932, until the Hendy Company went into corporate reorganization under Section 77-B in 1935 that the company was under a State receivership?

Mr. Ferguson: I will so stipulate.

A. Yes, I think the beginning of 1932.

Mr. Ferguson: May 17, 1932.

Mr. Jordan: Q. During a portion of that period of the State receivership Mr. Fred Behneman, the father of Dr. Behneman, one of the parties in this proceeding, was trustee, was he not?

A. No, he was a receiver.

Q. After Mr. Fred Behneman's death Mr. Bassick acted as receiver? A. Yes.

Q. You worked under first Mr. Behneman, and later Mr. Bassick as receivers during that period?

A. That is right.

Q. What was the nature of your duties at that time? A. I was manager of sales.

Q. Can you describe for us exactly what you did during that period, the nature of your duties?

A. It was my responsibility to make, or cause to be made, all of the sales, and the prices that would net a profit. Those were my principal duties.

Q. Would it be correct to say you were sales manager of the company? A. That is right.

(Testimony of Morris Levit.)

Q. As a matter of fact, you held that same position for many years prior to the State receivership under Mr. Behneman, did you not?

A. For a great number of years, yes.

Q. Will you state what your salary was during the State receivership per month, if it was so paid during that period?

A. Well, in the beginning my salary was at the rate of \$700 a month.

Q. What do you mean by "in the beginning"?

A. Well, when the receivership first started, and for a number of years prior to [467] that.

Q. How much was your salary for, say, a period of two or three years, two years prior to the State receivership?

A. \$700 a month with additional bonuses at the end of the year.

Q. And during the State receivership for a portion of the time you received \$700 a month?

A. That is, to the best of my recollection, yes. After that there were two reductions, voluntary reductions on my part, I think of \$100 each, so that when Mr. Bassick came in I had been paid up to that time \$500 a month.

Q. What was your compensation per month during the period of the reorganization being under the supervision of this court?

A. For a short time \$400, then \$450, and then for several years I got a bonus with my salary, \$6000 a year.

(Testimony of Morris Levit.)

Q. That bonus was paid during the course of the reorganization of the company under 77B?

A. That is right.

Q. You heard the stipulations by Mr. Ferguson and myself?

A. I listened to some of them, yes.

Q. We have the gross amount of your compensation, Mr. Levit, inclusive of both salary and additional compensation for the period from March, 1936 to the winter of 1940, at least to the time the sale took place. Can you tell us what your monthly salary was during that period of time?

A. I cannot tell you any better than I have already told you, Mr. Jordan. I have not got the records, but the books will reveal that, won't they?

Q. They will, but I thought perhaps you would remember.

A. No, I don't remember any better than what I have already told you.

Mr. Jordan: I think that is all, Mr. Levit. Thank you.

Mr. Ferguson: No questions. [468]

ELMER M. HYLAND,

Called for Plaintiff and Respondents; Sworn.

Mr. Jordan: May the record show that Mr. Hyland is also being called as an adverse witness under Rule 43-B of this Court?

(Testimony of Elmer M. Hyland.)

Q. Mr. Hyland, you are the E. M. Hyland named as one of the defendants in this matter?

A. That is right.

Q. You are also the Mr. Hyland who has been referred to as one of the vice-presidents of The Joshua Hendy Iron Works, commencing in April, 1936 and through to March of this year?

A. Yes.

Q. As a matter of fact, you were never a director of the company during that period?

A. That is right.

Q. But you were acting in the capacity of vice-president in charge of manufacturing?

A. Yes.

Q. You are president of the company at the present time, are you not?

A. Yes.

Q. And also a director?

A. Yes.

Q. Having been elected both as a director and as president on March 15 of this year?

A. Yes.

Q. Now, you also were in the employ of The Joshua Hendy Iron Works for many years prior to 1935, when the company went into reorganization in this matter?

A. Yes.

Q. You were with the company all during the State receivership?

A. Yes.

Q. Immediately prior to the reorganization proceedings, and for a long time prior to the State receivership?

A. Some 33 years total.

Q. Will you state just what the nature of your

(Testimony of Elmer M. Hyland.)

duties were up to the time that the company became involved in the corporate reorganization proceeding in this court in 1935?

A. From 1935 up to the time of the sale? [469]

Q. No, prior to 1935.

A. Prior to 1935 every position in the plant, practically, from timekeeper up to assistant manager.

Q. What was your position during the State receivership?

A. Assistant manager, that is, under Mr. Behneman; then when Mr. Bassick came I was plant manager and vice-president in charge of manufacture.

Q. Now, how long did you hold the position of assistant manager?

A. I would say some four or five years.

Q. And what, generally, was the character of your work during that time, what were your duties?

A. Well, I had charge of the manufacture under the plant manager.

Q. Well, you supervised the manufacture in the plant at Sunnyvale, did you?

A. Yes, I assisted in the supervising of it under the plant manager.

Q. What was your monthly salary during the time you were acting as assistant manager?

A. That was very varied. I think there were several changes, both up and down, but I do not recall each period just what the amount was.

(Testimony of Elmer M. Hyland.)

Q. Haven't you any idea?

A. About \$350 a month, plus bonuses.

Q. What would the bonuses bring the monthly compensation to?

A. I would not want to say, because I am not sure on my recollection.

Q. After you left the position of assistant manager I think you said a moment ago you became plant manager.

A. Plant manager and vice-president of manufacture.

Q. Was that during the period of the reorganization in this court, or was that immediately following the confirmation of the plan?

A. That was just about the time Mr. Behneman came in, which would be sometime in 1934, about April, 1934.

Q. What did your duties consist of when you took that position? [470] Were they any different from your work as assistant manager?

A. Very definitely. I had full charge of operating the plant; after Mr. Behneman came in as manager of the plant I was left the entire responsibility of running the plant.

Q. That was about the time that Mr. Bassick came in?

A. That is true.

Q. First, as receiver?

A. Yes.

Q. What was your salary as plant manager?

A. When I first started, I am not at all sure, but I think it was in the neighborhood of \$250 or \$275

(Testimony of Elmer M. Hyland.)

a month. I know it was when Mr. Bassick came in, and I figure that was about the same as I was getting when I was working part time as assistant plant manager.

Q. Now, how long did you continue at that salary before it was increased?

A. I don't remember.

Q. You don't remember? A. No.

Q. You have heard the stipulation here as to the total amount of compensation that you received, inclusive of salary and additional compensation from March 24, 1936 to the end of 1940.

A. I have.

Q. That recalls to your mind those figures are correct?

A. I could not say that, I would not say.

Mr. Ferguson: Just a moment.

Mr. Jordan: I will withdraw the question.

Q. Now, where were Mr. Bassick's headquarters immediately following his becoming receiver in the State receivership? A. In San Francisco.

Q. And did they continue in San Francisco after he became trustee under the 77B reorganization proceeding? A. Yes.

Q. They continued in San Francisco, did they not, even after the company came out of 77B and right up to the time the plant was [471] sold?

A. Yes, although he made frequent visits to the plant at Sunnyvale about twice a week.

(Testimony of Elmer M. Hyland.)

Q. Were you in a position to observe what Mr. Bassick did between March, 1936 and the time the plant was sold?

A. Only when he was at the plant, but I knew nothing about what he was doing in San Francisco, not in detail.

Q. He had nothing to do with supervising the work at the plant in Sunnyvale?

A. I conferred with him very much, and we consulted on various matters that came up.

Q. By that I mean that he was down there not regularly, but infrequently?

A. About twice a week, and he would take trips through the shop and look over the work with me.

Q. The rest of the time that he was not making these bi-weekly trips to the plant at Sunnyvale, as far as you know he was in the office at San Francisco?

A. Well, he was always accessible by telephone.

Q. Now, Mr. Hyland, will you, having been an employee and plant manager at Sunnyvale for a great number of years, describe exactly what type of product you put out down there? What did The Joshua Hendy Iron Works put out?

A. Well, I would say all types of machinery, but principally mining machinery and machinery for hydroelectric power plants.

Q. The company also did a general foundry business, did it not? A. That is true.

Q. That general type of activity was conducted

(Testimony of Elmer M. Hyland.)

as a manufacturer of machinery and the conducting of the general foundry business right up to the time that plant was sold in November, 1940?

A. Yes.

Q. Did you have occasion to go to Washington on behalf of The Joshua Hendy Iron Works at any time during 1940 for the purpose [472] of conferring on the possibility of obtaining a Navy contract for that company?

A. I was in Washington and saw the Navy in that connection, as well as the Army.

Q. About when was that?

A. About September, the latter part of September.

Q. September, 1940? A. That is right.

Q. How long did you spend in Washington on that occasion? A. Oh, about a week.

Q. Did you just make that one trip, or did you return?

A. I returned later after the company was sold.

Q. You returned after the company was sold?

A. That is right.

Q. And you made one trip to Washington in September of 1940 which was a matter of a month and a half or so prior to the consummation of the sale of the plant? A. That is right.

Q. You discussed the possibilities of a contract with the Navy Department?

Mr. Ferguson: One moment. I would like to in-

(Testimony of Elmer M. Hyland.)

quire what the purpose of this line of inquiry is leading to.

Mr. Jordan: I wish to establish by this witness, your Honor, that on November 15, or on November 4, as a matter of fact, 1940, when this company, the board of directors, granted an option to MacDonald and Kahn, that they were on the verge of securing a one million dollar contract, and there was a discussion at a meeting of the board on November 4, 1940, where they discussed the possibility of selling the plant, and in which sometime during the conversation some of the directors made various statements as to the strong probability of the company getting this one million dollar contract. I think it is pertinent to the issues in this case.

The Court: Why is it pertinent? There is no fraud alleged [473] here, as I understand it.

Mr. Jordan: No, there is no fraud alleged, your Honor, as far as specific allegations are concerned, but this is an equitable proceeding, and the conduct of the parties must speak for itself. It is a question for your Honor to decide whether that conduct was proper and equitable under all of the circumstances. I feel that it is pertinent and the Court should know the views of the various members of the board and the reasons behind the sale of that plant, because I think your Honor can almost take judicial notice of the tremendous expansion that this new company that bought the plant has made down there, and the very immense amount of defense work they are doing at the present time.

(Testimony of Elmer M. Hyland.)

The Court: When was the sale to the company?

Mr. Jordan: On November 15, 1940.

The Court: What is your objection?

Mr. Ferguson: Your Honor please, my objection to this testimony is this, that this case does not involve in any way any issue of whether the sale was properly or improperly made; the question here is had the corporation been successfully rehabilitated at the time they distributed that stock, and whether or not they might have got a contract had they continued to do business has no bearing and no relation in any particular upon that issue.

Mr. Jordan: They have said that this company was completely rehabilitated on December 20, 1940, a matter of a month and a half, or thereabouts, afterward they have sold the plant and gone out of business. Now, if they were rehabilitated and if their credit was reestablished so that they could do defense work, it does not sound reasonable that they would sell that plant, which had potentialities to do a great deal of work during this coming [474] period, and not from the sale of capital assets paid off \$274,000; still owning the plant they would have been able to pay that off and operate this business as a going concern of the stockholders, which I have no doubt was the intent of the plan; the intent of that plan was to rehabilitate this company, continue it as a going business, not to liquidate it right on the eve of probably the greatest period of activity they could have ever enjoyed.

(Testimony of Elmer M. Hyland.)

The Court: The objection is overruled. You may answer.

Mr. Jordan: Will you read the question?

(Question read by the reporter.)

A. Yes.

Mr. Jordan: I cannot ask you what your discussions were, but what was the character of the contract discussed?

Mr. Ferguson: May it be understood my objection runs to this entire line of inquiry?

The Court: Yes, let that be the understanding.

A. There was no particular contract discussed, but we did talk about certain work that might be done in our plant at Sunnyvale, part of which were torpedo tubes and gun mounts.

Mr. Ferguson: Q. As a matter of fact, The Joshua Hendy Iron Works did a considerable amount of government work during the first World War, did it not? A. Yes.

Q. What type of equipment or machinery were manufactured during that period at the Sunnyvale plant?

A. Engines and parts for boats.

Q. Did your discussion with the Navy Department on those occasions that you made the trip to Washington in September of last year deal with similar types of equipment?

A. Not at all, entirely different. [475]

(Testimony of Elmer M. Hyland.)

Q. But, nevertheless, the discussions did deal with the matter of equipment which was used by the United States Navy?

A. That is right.

Q. And to what extent did your negotiations progress at that time?

A. They were in the very early preliminary stages; it was a question of getting from us what we could produce, what they had to offer, and it was so far away that we could not determine at that time as to whether our tools would meet the close tolerances called for, because their drawings were incomplete, and we were only in a preliminary stage.

Q. As I understand you, Mr. Hyland, you did not discuss the manufacture by the Hendy Company for the Navy Department of any particular type of equipment or machinery on this particular occasion?

A. Oh, yes, we boiled it down to talk about the manufacture of a certain article.

Q. Was there any discussion regarding a contract for the manufacture by your company of that article for the Navy?

A. Yes, we had a preliminary estimate of the Navy as to what the probable cost would be per unit, and what the profit would be per unit.

Q. Taking all of the units discussed, which would have been embraced in this contract, in dol-

(Testimony of Elmer M. Hyland.)

lars in cents how much would it have run to the Joshua Hendy Iron Works?

A. That is impossible to say, because they were not in the position of being able to award any particular number of units, and they could not tell the value definitely because the designs had not been completed; it was in the early preliminary stage.

Q. Well, now, having completed your discussions with the Navy Department, and returned here again, did you upon your return make a report to the board of directors of the company? [476]

A. I made my report to Mr. Bassick.

Q. Mr. Bassick? A. Yes.

Q. Will you state what the substance of that report was?

A. Well, I described our conversations at Washington, and the nature of the work, and the possibility of our being able to produce that work, and as to what tools would be required; it was indefinite as to the quantity and quality, and I warned Mr. Bassick that it would entail a great expense for new equipment to go ahead with what the Navy would require.

Q. That was the substance of your report?

A. I think, generally, that covers it.

Q. Following the sale of the Sunnyvale plant to Felix Kahn and the later acquisition of the plant by the new corporation, known as The Joshua Hendy Iron Works, did you become an employee of that new corporation?

(Testimony of Elmer M. Hyland.)

A. I stayed on with the company for a few months after the sale.

Q. During that period you were engaged in what capacity? A. As plant manager.

Q. Can you tell us about when you left the employ of the new corporation?

A. February 5, 1941.

Q. Now, did you, subsequent to the trip to Washington in September, have occasion to return to Washington?

A. Yes, I went with the new president of the company back to the Navy Department again to look over the work that I had previously reported on to the old company.

Q. You discussed the matter of a contract on that trip, did you?

A. We discussed the prospect of getting some work and still they were not in a position to offer any definite contract, because the drawings were still incomplete.

Q. When was this second trip to Washington taken? A. In November, [477] I believe.

Q. November, 1940? A. Yes.

Q. That would have been between the 15th of November and the date of the sale?

A. It was after the sale of the plant.

Q. Now, you were with the new company until February of this year, Mr. Hyland?

A. Yes.

(Testimony of Elmer M. Hyland.)

Q. Do you know of your own knowledge whether or not the new company obtained any naval contracts?

Mr. Ferguson: One moment. I object to this question, not only on the grounds already specified, but the further additional ground that there is no standard of comparison, because there is no foundation or no showing that the new company possessed the finances, or anything else that was comparable with the facilities and finances of the old company. As a matter of fact, they were very dissimilar.

The Court: The objection is sustained.

Mr. Jordan: That is all, Mr. Hyland.

The Court: Any questions?

Mr. Ferguson: No questions.

The Court: We will have a recess of five minutes.

(After recess:)

CHARLES B. MOORES,

Called for the Plaintiff and Respondents; Sworn.

Mr. Jordan: May the record show that Mr. Moores also is being called under Rule 43-B of the Rules of Civil Procedure.

Q. Mr. Moores, you are an assistant cashier of the Bank of California, are you not?

A. Yes.

Q. And you have been for how long?

A. For the last seven or eight years—the last seven years.

(Testimony of Charles B. Moores.)

Q. You were assistant cashier of the Bank of California in April, [478] 1936, were you not?

A. Yes.

Q. In April, 1936 you first became a member of the board of directors of The Joshua Hendy Iron Works?

A. Yes.

Q. You have acted continuously in that capacity, have you not, up to the present time?

A. Yes.

Q. You are a director of the company to-day?

A. Yes.

Q. Now, as I understand, in the first instance that you were elected to the Hendy board of directors in April, 1936, April 8th, to be exact, of that year, and thereafter at each successive annual meeting of stockholders up to the present time, or at least until the annual meeting of November, 1940, you were nominated by the Bank of California, as a secured creditor of the Hendy Company?

A. Including the election of 1940.

Q. Did you hold any position prior to March of this year?

A. I was a vice-president.

Q. Vice-president during the entire period that you also acted as a director?

A. Yes.

Q. You are vice-president at the present time?

A. Yes.

Q. Now, as a director and vice-president of the Hendy Company during the period you have just stated, you had considerable contact with Mr. W. R. Bassick, did you not?

A. Yes.

(Testimony of Charles B. Moores.)

Q. Mr. Bassick, it has already been said, was president and general manager of the company practically from the time that the plan was confirmed in March, 1936, up to the sale of that plant. First of all, during the period from March 24, 1936 on which date the plan was confirmed, up to the annual meeting of stockholders in March, 1937, or until January of that year, Mr. Bassick was acting as trustee in the reorganization proceeding?

A. I don't recall the date, exactly.

Mr. Ferguson: That is correct; I will stipulate to that. [479]

Mr. Jordan: Q. In March of 1937 Mr. Bassick became a member of the board of directors of the company, president and general manager of the company, did he not?

Mr. Ferguson: So stipulated.

Mr. Jordan: Q. And acted in that capacity?

A. I don't know that.

Mr. Ferguson: On March 15, 1937 he became president.

Mr. Jordan: And Mr. Bassick acted in that capacity then continuously right through until the plant was sold in November, last year? A. Yes.

Q. Will you tell us just exactly what Mr. Bassick's duties were?

A. Mr. Bassick had general supervision of the entire operations and the sales and financial relations with the creditors of the company; that is,

(Testimony of Charles B. Moores.)

he was president of the company, and acted as such.

Q. Had you known Mr. Bassick prior to the time that he became connected with The Joshua Hendy Iron Works?

A. For several years.

Q. Had he at any time prior to his connection with the Hendy Company been employed by the Bank of California?

A. No, he had not.

Q. Now, referring your attention to a date slightly prior to November 4, 1940, the exact date I don't know, perhaps you can supply it, you were approached, were you not, by a representative of MacDonald & Kahn, Inc., with reference to the purchase by that company of the plant of the Hendy Company at Sunnyvale?

A. By Mr. Kahn, on November 4.

Q. November 4, 1940, and Mr. Kahn approached you at the Bank of California, did he?

A. Yes.

Q. What was Mr. Kahn's proposal on that occasion?

A. He asked if the company were for sale, and I told him it was a matter for [480] decision by the board of directors, and he asked me about what I thought it was worth, and I told him if he had any offer to submit that he would have to submit it to the Board of Directors.

Q. On that occasion of November 4, 1940, he did make an offer for the purchase of the plant?

(Testimony of Charles B. Moores.)

A. He made a written offer and a deposit of \$10,000 to bind that offer.

Q. That was the first time that you had been approached by Mr. Kahn with reference to the purchase of the plant, was it?

A. Yes, it was.

Q. Now, after Mr. Kahn had made the offer in writing, and had given you this check for \$10,000—by the way, that check was made payable to the Bank of California, was it not?

A. I believe it was.

Q. You then immediately called a meeting of the board of directors, did you?

A. I called Mr. Bassick and asked him to call a meeting of the board of directors.

Q. A meeting of the board of directors was held on the same day? A. Yes.

Mr. Jordan: May I have the minute book, Mr. Ferguson, please?

Mr. Ferguson: Yes.

Mr. Jordan: Q. Mr. Moores, I am going to show you the minute book of The Joshua Hendy Iron Works, which Mr. Ferguson has just handed me, and call your attention to the minutes of the meeting of the board of directors of that company held on November 9, 1940, at 3:00 o'clock p.m. Will you look at the minutes of that meeting in order to refresh your recollection as to what took place at that time? A. Yes.

(Testimony of Charles B. Moores.)

Q. You recall that meeting, do you?

A. Yes, very well.

Mr. Jordan: I would like to read the minutes of this meeting into the record, and then I would like to interrogate the witness. [481]

The Court: Very well.

Mr. Jordan:

“Minutes of a special meeting of the board of directors of The Joshua Hendy Iron Works.

“A special meeting of the board of directors of The Joshua Hendy Iron Works was held on November 4, 1940, at 3:00 o'clock p.m. at the office of the corporation, Room 702, 206 Sansome street, San Francisco.

“Present were all of the directors, W. R. Bassick, A. J. Mayman, C. B. Moores, Ernest H. Price and A. E. Webber. Also present was the company's attorney—Kenneth Ferguson.

“It was explained to the directors by Mr. C. B. Moores that the meeting was being called to consider an offer to the company by MacDonald & Kahn, Inc. wherein they tendered to The Bank of California, N. A. their check for \$10,000 payable to the bank's order, and authorizing payment of that amount to the company when the bank had obtained from the company an option to them expiring at noon November 15, 1940 for the purchase of the plant and facilities of the company at Sunny-

(Testimony of Charles B. Moores.)

vale, California, clear of all encumbrances except real estate taxes, in form and amount satisfactory to MacDonald & Kahn, Inc.

“Mr. Moores then read to the board a copy of the proposed option to MacDonald & Kahn, Inc., dated November 4, 1940.

“A general discussion of the proposed option took place by the board members, during which it was brought out that there was a good possibility of securing a Navy contract of a substantial amount, which should give the company a good profit if the plant were not to be sold. The discussion also developed the fact that the proposed price would pay all of the company's indebtedness and leave sufficient to pay the owners of beneficial interest in the company's stock approximately \$56 per share, [482] and whatever more could be realized from the sale of the San Francisco property of the company, which was not included in the sale.

“The possibility of the liability of the board members toward creditors and stockholders if the offer were not accepted and later losses reduced the company's capital, was also discussed.

“Mr. Bassick favored raising the price from that offered, but Mr. Moores reported that from his discussion with Mr. Kahn he was firmly of the opinion that they had offered top price, and any further attempt to raise that price might

(Testimony of Charles B. Moores.)

force them to withdraw their offer and search elsewhere for a plant.

“Upon motion duly made by Mr. Moores, and seconded by Mr. Price, it was resolved that,

“Whereas, MacDonald & Kahn, Inc., a corporation, has requested that his corporation, The Joshua Hendy Iron Works, grant to it an exclusive option to purchase the Sunnyvale plant, properties, and business of this corporation at the purchase price and upon the terms and conditions more fully set forth in the form of option agreement hereinafter incorporated in these minutes; which said form of option agreement also more fully describes the properties of this corporation to be covered by said option; and

“Whereas, MacDonald & Kahn, Inc. has delivered to this corporation the sum of \$10,000 in consideration of the granting of said option to 12:00 o'clock M., November 15, 1940 as provided in said option; and

“Whereas, the board of directors of this corporation deems it to be for the best interests of this corporation and its shareholders that said option be granted, and that if said option be exercised the property and assets of this corporation de- [483] scribed therein be sold to the holder and exerciser of said option in consideration of the payment by said purchaser

(Testimony of Charles B. Moores.)

of the purchase price set forth in said option and the assumption of the obligations and liabilities of this corporation in accordance with the terms and conditions set forth in said option;

“Now, therefore, be it resolved that the vice-president and secretary of this corporation be, and they are hereby authorized and empowered for and on behalf of this corporation, and as its corporate act and deed, to execute and deliver said option in the following form.”

The Court: Is it necessary to read that—the option?

Mr. Jordan: Yes.

The Court: I do not believe so.

Mr. Ferguson: I thought we had already covered it by a stipulation.

The Court: I suppose you have a copy of it, haven't you, or you can get one if you want it in evidence.

Mr. Jordan: We can get one. Perhaps it might be advisable to have one made and introduce it. Would you undertake, Mr. Ferguson, to have one made?

Mr. Ferguson: Yes.

Mr. Jordan: Unless you would like to have me read this.

Mr. Ferguson: I will be glad to have it made.

Mr. Jordan: Then immediately following the

(Testimony of Charles B. Moores.)

formal passing of the option, and going on with the resolution:

“Be It Further Resolved, that in the event that the holder of said option shall exercise it in accordance with its terms, that this corporation sell and transfer its properties and assets therein described in accordance with the terms of the option hereby authorized; and [484]

“Be It Further Resolved, that in accordance with the Civil Code of the State of California, the officers of this corporation be, and they are hereby, authorized and directed to take such steps as they may deem necessary or proper to procure the approval of the principal terms of the transaction and the nature and the amount of the consideration by the vote of those persons entitled to exercise a majority of the voting power of the outstanding stock of this corporation; and

“Be It Further Resolved, that upon procuring such approval, and upon the exercise of said option in accordance with its terms, the president or vice-president and the secretary or assistant secretary of this corporation be, and they are hereby, authorized and directed to execute and deliver in the name of and on behalf of this corporation all such deeds, bills of sale, assignments, agreements, and other instruments of transfer as may be deemed necessary or

(Testimony of Charles B. Moores.)

proper to effect such sale pursuant to the exercise of said option, and in general to do any and all acts and things necessary to carry out, perform, and consummate said option and/or sale.”

Then follows the directors voting.

“Directors voting Aye were Messrs. Moores, Price, Mayman and Weber. Director voting No, Mr. Bassick. The motion was therefore duly carried and the vice-president and secretary of the corporation executed the above-described option.

“Following there was a general discussion regarding distribution of the shares of the company’s stock to the management in accordance with the plan of reorganization. It was decided that such distribution would not be made at this time, pending an exercise of the option, and that such distribution would be considered at some future date. [485]

“There being no further business, on motion duly made and seconded the meeting was adjourned.”

Signed, “A. J. Mayman, Secretary.”

Mr. Ferguson: Of course, part of these minutes is hearsay.

Mr. Jordan: I thought that I only attempted to read the resolution and the preliminaries leading up to it.

(Testimony of Charles B. Moores.)

Q. Now, regarding a very short portion of that resolution, I read as follows:

“A general discussion of the proposed option took place by the board members, during which it was brought out that there was a good possibility of securing a Navy contract of a substantial amount, which should give the company a good profit if the plant were not sold.”

Do you recall what directors indulged in that discussion?

A. All of them.

Q. Can you state what was stated by the various directors present at the meeting in that connection?

A. I can give you the substance of the remarks, if that is what you want.

Q. To the best of your ability, you may tell us what was said by various directors.

A. Mr. Bassick, was, of course, of the point of view, with the government work that there would be, that was in prospect for the next several years, that the plant was in a position to take some of that work, probably at a profit that would eventually tend toward a reduction of the indebtedness of the company. Those representing the creditors, particularly, and Mr. Webber, representing the stockholders, said that it would be necessary to do a considerable amount of financing to be in a position to take on any of that work—the particular job under discussion which we talked about amounted to a

(Testimony of Charles B. Moores.)

million dollars or [486] more, and The Joshua Hendy Company did not have any million dollars, and did not have any prospect of getting it.

Q. Then it was your feeling at that time, and the feeling of the board of directors who voted in favor of the granting of the option, that the condition of the company was such that it could not establish credit sufficient to carry on the defense work?

A. Well, it might have been able to take on some other piece of the defense work, but the particular job that was under discussion was too large for them under their financial condition to take on.

Q. What was the particular job under discussion?

A. That was the manufacture of torpedo tubes for the Navy Department; I believe that was in prospect; I do not believe it has been started yet; it was rather indefinite, it was an indefinite prospect of work of that nature.

Q. Are you referring now to the conversation that Mr. Hyland had with the Navy Department in Washington? A. Yes.

Q. In the previous September? A. Yes.

Q. As I understand it, then, there was no particular Navy contract that was in sight at that time?

A. No, there was not; there was nothing definite. Mr. Hyland had reported as to the result of his trip; the Navy Department were inquiring as to

(Testimony of Charles B. Moores.)

whether or not the plant of The Joshua Hendy Iron Works could handle that type of work, and it was agreed among all of those who were familiar with the thing that the plant could not handle that type of work.

Q. As a matter of fact, this particular job that we are talking about now was to run in the neighborhood of a million dollars, was it not?

A. Yes.

Q. And it is also a fact, is it not, that shortly subsequent to [487] the sale of the plant to MacDonald & Kahn and the taking over of the plant by the new Joshua Hendy Company, that the Navy Department awarded that company such a contract?

A. I believe that they have.

Mr. Ferguson: Just a moment. That is objected to on the ground that whether or not somebody else got the contract afterward is no criterion whether this corporation could or could not have undertaken it, or would or would not have gotten it.

The Court: The objection is sustained. It is entering into the realm of speculation, too. It is a matter of common knowledge, we all know, that the firm of MacDonald & Kahn might be able to finance a very large contract of that character, and I suppose there is no dispute the Joshua Hendy Company could not do it at that time. MacDonald & Kahn are one of the Six Companies.

Mr. Jordan: That is correct.

Q. Mr. Moores——

(Testimony of Charles B. Moores.)

The Court: Did I understand you to say that no such contract as that has been entered into by the Government?

A. I do not think it was commenced, because the plant that was necessary to carry it on, the construction of it, as I understand it, has not been completed. They built a million dollar plant down there, in addition to the plant.

Mr. Jordan: Q. In that connection, I would like to ask this question, if you know, Mr. Moores: Isn't it a fact that the additions which have been made to the Sunnyvale plant since its acquisition by the new Joshua Hendy Iron Works have been financed by money supplied by the United States Government?

A. Partially.

Q. Mr. Moores, the minutes here indicate that you and Mr. Price, and Mr. Mayman, and Mr. Webber, all voted that the option be [488] granted, and Mr. Bassick voted against it. Have you already in your testimony stated the reasons expressed by Mr. Bassick why he did not feel that the option should be granted?

A. I have already stated the reasons he gave at the time.

Q. In other words, as I understood it, and you correct me if I am wrong, Mr. Bassick felt that by a continuation of the company defense work could be obtained and profit made. Does that summarize it? A. Yes.

(Testimony of Charles B. Moores.)

Mr. Jordan: Mr. Ferguson, I have just shown you a copy of a letter dated November 23, 1940, addressed to the Board of Directors of The Joshua Hendy Iron Works, 206 Sansome street, San Francisco, California, signed by myself, for Byrne, Lamson & Jordan. Can you produce for me the original of that letter?

Mr. Ferguson: I will stipulate that the directors got it on or about the date it bears the first time they had a meeting.

Mr. Jordan: Q. Mr. Moores, I will ask you to look at that letter and read it, if you like. Do you recall having seen that letter before, or having heard it read? A. Yes, I saw it.

Q. It was read at a meeting of the Hendy board of directors shortly subsequent to the date it bears?

A. I am not sure of that; the minutes will show.

Mr. Jordan: I would like to introduce this letter as the next exhibit in order on behalf of plaintiff Shores and Respondents Shores and Behneman.

Mr. Ferguson: It does not relate in any way to the Shores case, does it?

Mr. Jordan: It relates to the Shores case, which is consolidated, here.

Mr. Ferguson: I have no objection.

The Court: It may be admitted. [489]

(The document was marked "Plaintiff's and Respondents' Exhibit 2.")

The Court: We will continue the trial until tomorrow morning at 10:00 o'clock.

(An adjournment was here taken until tomorrow, Wednesday, September 22, 1941, at 10:00 o'clock a.m.) [490]

Wednesday, September 22, 1941—10:00 o'clock A.M.

The Court: You may proceed.

Mr. Ferguson: I believe Mr. Moores was on the stand.

Mr. Jordan: Yes.

CHARLES B. MOORES,
recalled;

Direct Examination
(resumed)

The Witness: I would like to qualify some testimony that I gave yesterday, that is, when I said that the present Joshua Hendy Iron Works was partially financed by government funds. That statement is not correct. According to Mr. Kahn's statement, about three million dollars of their own money will be put in and they will receive half a million dollars from the government as the cost of one particular unit of the plant, in payment of one-sixtieth over a period of five years as the work progresses. They will pay them one-sixtieth of the cost of this plant as a part of the cost of the job, so that they will be reimbursed rather than financed.

(Testimony of Charles B. Moores.)

Mr. Jordan: Q. The statement that you have just made, I take it, Mr. Moores, is information that you obtained from Mr. Kahn?

A. Yes, it is information that I had before my testimony of yesterday, and I wanted to clarify that statement, rather than it be said they were getting government financing.

Q. Then your recollection is better than it was yesterday afternoon.

Your Honor, there was introduced in evidence a letter, which was marked Plaintiff's Exhibit No. 2. I would like to read that letter into the record.

The Court: It may be deemed read, unless there is something [491] you wish to call my attention to.

Mr. Jordan: There is.

The Court: You have already given me the substance of it, haven't you?

Mr. Jordan: Yes. This is a letter which was written by myself to the Board of Directors on November 23, 1940, and which, in substance, questioned the successful rehabilitation of the company, and that we be advised prior to any distribution of the stock, in order that Dr. Behneman might take any steps to protect his interests.

The Court: I understood you to state that in your reference to the letter.

Mr. Jordan: That is correct.

The Court: That may be deemed read.

Mr. Jordan: Q. Mr. Moores, was the letter

(Testimony of Charles B. Moores.)

which I have just referred to as Plaintiff's Exhibit No. 2, ever discussed by the board of directors.

A. It was.

Q. That was shortly subsequent to the date on which it was received, which would have been probably a day or so after November 23? A. Yes.

Q. Will you state what that discussion was?

A. I do not recall exactly, but I know that the consensus of the board was to the effect that they thought that the plan of reorganization had been concluded and that they were under a mandate from the court, under the plan of reorganization, to distribute all of that portion of the stock to someone, that someone being the management of The Joshua Hendy Iron Works.

Q. And that feeling, or that thought of the board, as you have just expressed it, was not communicated in any way to either Dr. Behneman or his counsel?

A. No, not as far as I know, [492] except that they had been notified of the sale of the plant.

Q. The point I am making is that prior to the actual distribution of the stock to Mr. Bassick, Mr. Hyland, and Mr. Levit on December 20 no notification was given Dr. Behneman or his counsel of the intention to distribute the stock?

A. Not as far as I know.

Q. Notwithstanding this letter, and it having been read and discussed in board meeting? A. Yes.

Mr. Jordan: Mr. Ferguson, may I have the min-

(Testimony of Charles B. Moores.)

ute book again? I want to refer again to the board meeting of November 4, 1940, at which it was determined that the option be granted. All of the minutes of this meeting were read into the record yesterday, and I want to call the attention of the witness to a portion of the minutes which reads as follows:

“The discussion also developed the fact that the proposed price would pay all of the company’s indebtedness and leave sufficient to pay the owners of beneficial interest in the company’s stock approximately \$56 per share, and whatever more could be realized from a sale of the San Francisco property of the company which was not included in the sale.”

Now, will you tell us upon what facts or considerations that estimate of \$56 per share was based?

A. It was based on the outstanding stock of 4000 odd shares, and there were certain outstanding obligations—it neglected to take into consideration the Federal and State income tax on the profit on the sale, so that the estimate would have to be adjusted to the amount of the Federal and State tax upon the profit on the sale.

Q. Then, if I understand you correctly, the directors, in estimating the liquidating value of all of the assets of the company, took into consideration the outstanding obligations still payable [493] under the plan, and tax liabilities, to arrive at an

(Testimony of Charles B. Moores.)

estimate of \$56 a share to be paid to the stockholders?

A. They did not take the tax liabilities into consideration, that is the point.

Q. They did not?

A. That was overlooked in arriving at that figure.

Q. All of those other factors, other than the tax liabilities were considered?

A. Yes, other than tax liability.

Q. In arriving at that estimate? A. Yes.

Q. And that estimate did not take into consideration what might be obtained through the sale of the North Beach property?

A. No, it did not.

Q. Now, the language here, "and leave sufficient to pay the owners of beneficial interest",—the only owners of the beneficial interest in outstanding stock of The Hendy Company on the date of this meeting were the holders of the 1907 $\frac{3}{4}$ shares—in other words, those we have referred to during this trial as 'old stockholders,' isn't that correct?

A. It was the intention in drafting that resolution that there would be 4,000 odd shares outstanding: they were not merely considering the 1907 $\frac{3}{4}$ shares that were in the hands of the former stockholders that were deposited; they were considering it would also have that effect on the stock that would be distributed pursuant to the plan.

(Testimony of Charles B. Moores.)

The Court: This \$56 a share, who did that relate to?

A. It would be paid to whoever would be holders of the beneficial interest after the issuance of the stock to the management.

Mr. Jordan: Q. Had it been determined by the board on this date, November 4, 1940, at which you discussed the advisability of granting the option to sell the Sunnyvale plant, whether [494] or not this trustee stock of 2212½ shares then held by the board under paragraph 6-G-2 of the plan, was to be distributed to the management?

A. It was always understood it was to be distributed to the management.

Q. You say it was always understood. I am going to read to you a further portion of the minutes of this meeting, which reads as follows. This is the meeting of November 4, 1940:

“Following there was a general discussion regarding distribution of the shares of the company’s stock to the management in accordance with the plan of reorganization. It was decided that such distribution would not be made at this time, pending an exercise of the option and that such distribution would be considered at some future date.”

A. Yes.

Q. Now, I am going to ask you, was the matter of distributing these 2212½ shares of stock held in

(Testimony of Charles B. Moores.)

trust by the voting trustees and directors ever discussed in a board meeting prior to November 4, 1940?

A. I believe it was at various times, yes.

Q. You regularly attended all board meetings during the time that you were a director?

A. I may have missed one or two.

Q. Would you know whether or not any of those discussion with respect to the distribution of this stock was recorded in the minutes of any of the directors meetings which occurred subsequent to March 24, 1936 and up to November 4, 1940?

A. It may appear in the minutes, I don't know that it does.

Mr. Jordan: Will it be stipulated that there is no reference in the minutes of any of the meetings, either of voting trustees, or directors, or stockholders and creditors from March 24, 1936 to November 4, 1940—no recordation of any discussion in the minutes? [495]

Mr. Ferguson: I cannot stipulate, I have not been through the minutes. I do not know if there are or are not.

Mr. Jordan: I can say there is no reference at any time in any of the minutes of any discussion prior to November 4, 1940.

The Witness: There was never any discussion as to who should get the stock, it was merely said when the stock was distributed—the discussions were very informal, all the statements were that the

(Testimony of Charles B. Moores.)

stock at some time would be distributed to certain of the members of the management, but it never was stated as to how many shares they were going to get, or anything of that kind; it never reached that stage.

Q. Now, taking the date March 24, 1936, when this court approved the plan of reorganization and going forward from there, at what point thereafter was it understood or always considered by the board that this stock would be distributed?

A. From the very inception of it.

Q. You mean that your testimony is, as I understand it, that from the time that the plan of reorganization was approved by this court that the board of directors at all times thereafter definitely determined that this stock would be distributed?

A. They determined if it had some value it would be distributed. That was the point, if that is what you are trying to arrive at.

Q. No, I am not trying to arrive at that. I am trying to arrive at the state of mind of the board of directors of this company.

A. It was determined when the company had been sufficiently established, when its financial condition justified it, that they would distribute the stock to the management.

Q. When the financial condition justified it?

A. Yes. That was never defined.

Q. That was never defined? A. No. [496]

(Testimony of Charles B. Moores.)

Q. Did you consider the phraseology of the plan of reorganization with reference to successful rehabilitation of the company?

A. Certainly.

Q. Did the board of directors, you, yourself, or any other member of the board, to your knowledge, ever make any promise or representation to either Mr. Bassick, Mr. Hyland, or Mr. Levit at any time prior to November 4, 1940, that when the company was in condition to do so that the stock would be distributed?

A. Repeatedly, yes.

Q. Can you tell us under what circumstances such representations were made?

A. Well, it was done at different times, when there was an appeal made for an increase in compensation, it was explained to Mr. Bassick and through him to Mr. Levit and Mr. Hyland, and also directly from me to Mr. Hyland and Mr. Levit, that we realized that they were not properly compensated for their work, they were merely being paid what you would call a retainer; that as the financial condition of the company warranted, they would be increased by periodical payments or interim bonuses, and that some day, if they were successful in the management of the company and placed it in such financial condition as warranted it, that they would then have a half interest in the business, and perhaps some of their other associates.

Q. Let me ask you this: You made this representation personally, did you?

A. Yes.

(Testimony of Charles B. Moores.)

Q. To all three of these gentlemen?

A. Yes.

Q. Was that during board meetings?

A. No, it was not during board meetings.

Q. There was never any formal resolution of the board adopted which held out that prospect to any of those three gentlemen, was there?

A. No, there was not. [497]

Q. Were you ever authorized by the board of directors to make such a representation to Mr. Bassick, Mr. Hyland and Mr. Levit?

A. Yes, because it was understood in the telephone conversations and in the conversations with other members of the board, that that was the plan.

Q. But no formal resolution was ever adopted delegating the authority to you to make such representations? A. No.

Q. As I understand your testimony, it was decided almost immediately following the confirmation of this plan that that stock would some day be distributed to those three men?

A. Under certain conditions it would be, not if the business were abandoned at the end of the five-year period, or any interim period.

The Court: Q. What were the conditions?

A. The conditions were it would not be distributed if it had no value, if it had a value it would be distributed.

Q. You answered the question of Mr. Jordan

(Testimony of Charles B. Moores.)

and said that the stock would be distributed to those gentlemen upon certain conditions.

A. Correct that statement. The conditions were not certain, there was no certainty.

The Court: Will you pursue that examination further?

Mr. Jordan: Q. And you cannot state, then, that there were any definite conditions upon which, in the mind of the board of directors, this stock would be distributed to Mr. Bassick, Mr. Hyland and Mr. Levit?

A. On a satisfactory financial condition of the company—what would be satisfactory had not been determined.

Q. There was no determination that the condition of the company was satisfactory to the extent of permitting the distribution of this stock until December 4, 1940, was there? [498]

A. Well, it had not been discussed in the month of December, 1939, after the figures for 1939 were available—until that time that is true, it had not been discussed as to whether there would be any distribution.

Q. In other words, the first discussion in reference to the company having reached a financial condition where it would be appropriate under the plan of reorganization to distribute this stock took place on December 20, 1940?

A. No, there were informal discussions among the directors, not at a meeting, perhaps, or perhaps

(Testimony of Charles B. Moores.)

there were—it was discussed at the meetings and at other times informally that the company was now in a position where the stock was beginning to have some value, and it was the time to consider when we were to distribute it, and we said that as long as the five-year period had lapsed in March, 1941, that that would complete the trial term, as outlined by the court originally, that was as good *as* a time as any to make the distribution, unless there was some trouble started in in the affairs of the company that made it unwise to distribute the stock.

Q. When, to the best of your recollection, was the first informal discussion upon that subject?

A. That was along in March or April, 1940.

Q. March or April, 1940? A. Yes.

The Court: I understand from you, Mr. Moores, it was understood from the beginning of the reorganization proceedings that this stock should be distributed to the managing officers?

A. When the financial condition of the company was satisfactory.

Q. When the financial condition justified it?

A. Yes.

Q. Now, was that discussed with these men before the filing of the plan of reorganization?

A. It was discussed in the [499] plan, itself, before the reorganization. I don't know that we did with any of them at that time except Mr. Bassick, but I know that we did with him, because before we adopted the plan Mr. Bassick was the one who

(Testimony of Charles B. Moores.)

had the provision placed in the plan, or it was at his insistence that it was placed in the plan, that the creditors would reduce the amount of indebtedness by 10 per cent. on the secured and 15 per cent. on the unsecured indebtedness, so that the job would not be so hopeless from the management point of view.

Mr. Jordan: Q. As I understand it, Mr. Moores, then, practically from the inception of this plan of reorganization, or even during the time it was being formulated, and before it was approved, the intent was that this stock would be distributed to the management?

A. I presume that is what the plan intended.

Q. From the time that the board of directors, which was elected, or rather nominated, pursuant to paragraph 7 of the plan, came into being, on April 8, 1936, it was the feeling and intent of the entire board that distribution of this stock would be made at a future date?

A. You say in 1937?

Q. In 1936, when you first went on the board.

A. Yes.

The Court: You signed for the Bank of California the proposed plan of reorganization, did you not? A. Yes, I did.

Q. Which contained the very provision we are now discussing? A. Yes.

Mr. Jordan: Q. And having determined, Mr. Moores, that this stock would be distributed in the

(Testimony of Charles B. Moores.)

future upon certain conditions, it is my understanding of your testimony that those conditions were not very well defined?

A. No, they were not.

Q. You cannot tell us to-day what they were?

A. No.

Q. You made the remark a moment ago "when the condition of the [500] company warranted it." Now, was there any standard established or adopted by the board of directors of the company conditions which, if reached, would bring about a distribution of the stock? A. No, there never was.

Q. There never was? A. No.

Q. It is a fact, is it not, that the first time when a resolution was adopted by the board of directors of the Hendy Company in which it was declared and determined, according to the board, that the affairs of this company had been successfully rehabilitated was on December 20, 1940?

A. That is true.

Q. And it is also true, is it not, that the sale of the plant had been consummated something over a month prior to the date of that meeting?

Mr. Ferguson: I object to that as calling for a legal conclusion.

Mr. Jordan: I believe the stipulation was that the sale was consummated on the 15th of November.

Mr. Ferguson: I did not stipulate to that. I said that the option was exercised on the 15th and the title passed, but I refused to stipulate as to the legal

(Testimony of Charles B. Moores.)

conclusion of when the sale was actually consummated. I think that is a legal conclusion.

Mr. Jordan: I think the stipulation was, Mr. Ferguson, that the Hendy Company received a total of \$426,000, which represented the consideration for the sale of that property, before the end of November, 1940.

Mr. Ferguson: There is no question about that, but you have just asked the witness when the sale was consummated, and that question calls for a legal conclusion.

Mr. Jordan: I was merely desirous of calling the Court's attention to the date, and to the fact for the first time that [501] there was a determination of successful rehabilitation was on December 20, which was over a month after the company had practically gone out of business.

Q. Mr. Moores, you have been fully familiar with the general financial condition of the Hendy Company, have you not, from the time that you first went on the board in 1936, right through to the present time? A. I believe so.

Q. It is true, is it not, that the Bank of California had loaned the Hendy Company very considerable sums of money for a period of approximately fifteen or twenty years before the company went into reorganization in this court?

A. It had.

Q. In other words, the bank had been a substantial creditor, both secured and unsecured, of the

(Testimony of Charles B. Moores.)

Hendy Company during the period from and including the first World War period right through to the time when the bank finally received this money in November or December, 1940?

A. A considerable time prior to that, too.

Q. Prior to the first World War? A. Yes.

Q. At all times during that period, then, the bank had been a substantial creditor of the Hendy Company?

A. Since 1907, as far as I know.

Mr. Jordan: I believe it was stipulated yesterday, was it not, Mr. Ferguson, that the Bank of California, at the time this plan was adopted, held 90 per cent., or better, of the secured claims against the Hendy Company?

Mr. Ferguson: If it was not stipulated it was a fact.

Mr. Jordan: It was a fact?

Mr. Ferguson: Yes.

Mr. Jordan: I think you also said that the bank held about 85 per cent. of the unsecured claims at the time the plan was approved? [502]

Mr. Ferguson: That is approximately correct.

Mr. Jordan: Q. Do you know of your own knowledge how much the bank had coming from the Hendy Company at the time that the sale of the plant was consummated in November, last year?

A. I do not have the figures, without reference to the books.

(Testimony of Charles B. Moores.)

Q. Have you an approximate idea of about how much that amounted to?

Mr. Ferguson: The books are the best evidence.

Mr. Jordan: I think that Mr. Moores' sworn answer to our interrogatories is perhaps a good answer.

Q. By the way, Mr. Moores, you recall, do you not, swearing to certain answers made by yourself and the other defendants in this matter?

Mr. Ferguson: I will stipulate to the answers, Mr. Jordan.

Mr. Jordan: Answer 3 to Interrogatory 3 shows that the principal amount of unsecured obligations remaining unpaid on the 15th of November, 1940, was \$143,522.96. You recall that figure generally, Mr. Moores? A. Yes, that is approximately.

The Court: Unsecured claims?

Mr. Jordan: That was the total of unsecured claims which had been deferred under the plan, and were unpaid on November 15. Answer No. 4 to Interrogatory No. 4 indicates that the principal amount of the secured obligations remaining unpaid as of November 15, 1940, were \$131,443.61.

Mr. Ferguson: That is correct.

Mr. Jordan: And will it be stipulated, Mr. Ferguson, that the Bank of California held substantially all of the claims totaling those two amounts?

Mr. Ferguson: No, that is not correct. As to of them as of November 15, [503] 1940; the other

(Testimony of Charles B. Moores.)

secured creditors, only few in number had been paid. As to the unsecured claims, there were other creditors in a substantial amount.

Mr. Jordan: In any event, the Bank of California had coming on November 15, 1940 from the Hendy Company very considerable in excess of or approximately \$300,000, did it not?

Mr. Ferguson: Oh, no, I think that was the total obligations, principal and interest.

Mr. Jordan: In excess of \$250,000. The total was \$274,000.

Mr. Ferguson: If you make it \$200,000 I will stipulate to it.

Mr. Jordan: Will you stipulate it was in excess of \$200,000?

Mr. Ferguson: Yes, I believe it was.

Mr. Jordan: Q. When the bank received its payment, either in November or December, 1940, of this amount that was owing at that time, which Mr. Ferguson has stipulated was in excess of \$200,000, that was the first time since 1907 that the Bank of California had ceased to be a creditor of the Hendy Company. Is that correct?

A. That is correct.

Q. Mr. Moores, had the Bank of California loaned the Hendy Company any money subsequent to the consummation of the plan on March 24, 1936?

A. Yes, it had.

Q. Do you know of your own knowledge the amount of those loans?

(Testimony of Charles B. Moores.)

A. They were granted an aggregate of \$250,000; I don't know whether it was all used up to \$250,000 or used up to \$225,000.

Q. Then, in addition to being a deferred creditor under the plan, the Bank of California continuously during that period following the consummation of the plan, and up to the time of sale of the plant was a very substantial creditor of this company? [504]

A. Not continuously, no.

Q. Well, periodically. A. Periodically, yes.

Q. Was the bank a creditor of the Hendy Company under this new loan arrangement which went into effect after the plan was confirmed, at the time the plant was sold?

A. No, I do not believe it was.

Q. As a matter of fact, the Hendy Company did not borrow any money from any other institution or individual from the time that the plan was confirmed up to the date of the sale of the plant, did it?

A. No, it did not, except in the normal course of business, they established credit for supplies, and that sort of thing.

Q. They did not borrow any working capital from anyone, or actually make a loan with anyone other than with the Bank of California?

A. No.

Q. I think you testified a while ago that you were fully familiar with the financial condition of

(Testimony of Charles B. Moores.)

this company during the entire time that you were on the board? A. Yes.

Q. And, of course, you are familiar with the condition of that company on November 15, 1940?

A. Yes.

Q. Now, from your knowledge of the condition of the Hendy Company on that date, which was prior to the actual sale of the plant at Sunnyvale, and prior to the receipt of the \$426,000 consideration, was that company in a condition, financially, to declare and pay additional compensation or bonuses to officers and employees in the amount of approximately \$103,000?

Mr. Ferguson: We object to that on the ground it calls for the conclusion of the witness on a matter on which it is not the best evidence.

The Court: If you know you may answer.

A. I do not recall if that is a fact, if the money had not been [505] paid until November 15.

Mr. Jordan: Q. I am going to ask you the same question, directing it from the standpoint of time to a time immediately prior to the consummation of the sale of the plant, and immediately prior to the receipt of this consideration of \$426,000, was this company financially in a condition at that time to declare and pay bonuses to its officers and employees of \$103,000?

A. I would have to refer to the records for that, but as of that particular date I do not recall off-hand.

(Testimony of Charles B. Moores.)

The Court: Have you that, Mr. Ferguson?

Mr. Ferguson: I have the figures there of September 30, but the question involves a conclusion as to whether there were current assets over \$103,000.

Mr. Jordan: I do not think that is asking anything unfair of this witness.

The Court: If he does not know you cannot ask him.

Mr. Jordan: Q. Let me ask you this, Mr. Moores, in view of your knowledge of the condition of the Hendy Company immediately prior to the sale of the Sunnyvale plant and receipt of proceeds of sale by the company, was the company in a financial condition at that time to pay off in full the then remaining unpaid deferred obligations under the plan of reorganization, which admittedly amounted to \$274,966.57?

A. Not by payment of cash on hand, if that is what you mean.

Q. That is exactly what I mean. This \$274,966.57 would have become fully payable on March 24, 1941, would it not, under the plan?

A. With the privilege of renewal under certain circumstances.

Q. Is there anything in the plan which would bind any creditor of this company to extend beyond five years the maturity of [506] his claim?

A. The plan is there, you can read it. I believe it does.

(Testimony of Charles B. Moores.)

Mr. Ferguson: The plan provides that unsecured notes are renewable at the end of five years.

Mr. Jordan: Does that mean that the company could authorize the extension of time? The unsecured notes on November 15, 1940 totaled \$143,000.

Mr. Ferguson: \$143,000, to which must be added interest.

Mr. Jordan: The amount of unsecured obligations payable on November 15, 1940 was \$143,522.96.

Mr. Ferguson: That is right.

Mr. Jordan: And the principal amount of the secured obligations on that date was \$131,443.61.

Mr. Ferguson: That is correct. The plan provides as to unsecured notes and accounts, "Such notes shall bear no interest at all for the first three years, and interest thereafter at the rate of 5 per cent. per annum, payable only if earned, and payable then only upon maturity; with the privilege to the debtor corporation, at maturity, to renew said notes for their face value, plus accumulated interest, such renewal notes to bear interest at 5 per cent. per annum, and be payable in five annual installments of 20 per cent. each." So there was in the plan certainly the privilege of renewal of those notes.

Mr. Jordan: Those are unsecured notes. Is there any similar provision so far as secured notes are concerned?

A. The plan speaks for itself, I think it is in the plan.

Mr. Jordan: I do not recall.

(Testimony of Charles B. Moores.)

Mr. Ferguson: It is at the top of page 6, under 3-C class notes. "If, upon the five-year due date of said note, the property [507] shall not yet have been sold, and the taxes thereon have been paid, the debtor corporation may renew said note for a further period of five years, such renewal note to bear interest at 5 per cent. per annum.

The Court: What page are you reading from?

Mr. Ferguson: That is at the top of page 6 in Class C notes.

Mr. Jordan: Q. I think you can answer this question: In order to pay the approximate \$103,000 of additional compensation which was declared and paid on December 4, 1940, and to pay the unpaid deferred obligations of \$274,966, which were paid admittedly sometime subsequent to the receipt by the company of the proceeds of the plant, it was necessary to resort to the proceeds of the sale of the plant, was it not? A. Yes, certainly.

Q. And, putting it in another way, the company could not have paid every one of those items if it had not been for the sale of the plant, could it?

Mr. Ferguson: You mean it did not have sufficient cash?

Mr. Jordan: Yes.

Mr. Ferguson: If that is what the question is, all right.

A. It did not have sufficient cash. They might have been able to refinance or do something else and accomplish the same thing.

(Testimony of Charles B. Moores.)

Mr. Jordan: Q. Now, from March 15, I think it is, 1937, to March, 1941, the Bank of California had a representation of three directors on the Hendy board, had it not, namely, yourself, Mr. Mayman and Mr. Bassick?

A. They were entitled to three yes.

Q. They had three continuously during that period?

A. Mr. Bassick was elected to take the place of Mr. Mills, who represented the bank.

Q. Mr. Moores, can you estimate at this time the approximate [508] amount that will be available for distribution in the form of further liquidating dividends of this company?

A. Off-hand, the only asset of any moment is a lot at North Beach that has been for sale since 1906 and still is for sale.

Q. With the exception of the additional compensation, and the deferred claims under the plan, and the \$85,000, roughly, those are all rough figures, declared and paid in the form of first liquidating dividends which total something over \$462,000, and those payments all made in either November or December, 1940, do you recall any other substantial disbursements of money by the Hendy Company during those months?

A. I do not.

Q. Have you any way of determining what the potentialities are with respect to the sale of that

(Testimony of Charles B. Moores.)

North Beach property, what you think you could get for it?

A. The Board of Directors has authorized the sale at \$1 a square foot, which I think, as there are 37,812 feet in the property, would be approximately \$37,000.

Q. And to that would be added the proceeds of liquidating any other assets the company has?

A. Accounts receivable, maybe a thousand dollars additional.

Q. Do I understand, then, that in the main, \$37,000 is about the maximum amount that could be expected to be distributed as further liquidating dividends of the Hendy Company?

A. No, I imagine if that lot were sold for \$37,000 there would be about \$45,000 to distribute.

Q. About \$45,000? A. Yes.

Q. That would be after payment of all tax liabilities?

A. They have not yet been determined finally, I have not the figures.

Q. But that is your estimate, that \$45,000 will be available for [509] distribution as liquidating dividends? A. Approximately.

Q. As a member of the present board of directors, I presume that it is the intent of that board, is it not, when the time comes to make a distribution of further liquidating dividends, to declare those dividends on the entire outstanding 4120 $\frac{1}{4}$ shares?

(Testimony of Charles B. Moores.)

A. I think there is some agreement not to make it.

Mr. Ferguson: We came in before Judge Wyman and agreed with Mr. Jordan that that would not be done until this litigation was over.

Mr. Jordan: I appreciate that, Mr. Ferguson. I am not thinking for one moment you are going to make any distribution until this litigation is determined.

Mr. Ferguson: That was merely by way of explanation.

Mr. Jordan: Q. My question was this, when the time comes to properly distribute further liquidating dividends, is it or is it not the intention of the board of directors to distribute those dividends across the board on all of the 4120 $\frac{1}{4}$ shares?

A. Yes.

Q. That would mean that Mr. Bassick, Mr. Hyland, and Mr. Levit would share pro rata?

A. An equal distribution.

Q. That is, you intend to do that unless this Court should see fit to restrain you?

A. Yes, or some other court.

Q. Mr. Moores, I am going to again refer you to the answers to the interrogatories of Behneman and Shores, sworn to by you on the 23rd of July, 1941. I call your attention to Answer 15, appearing on page 11 of the Answers—I am going to show you the original of your sworn answer, Mr. Moores,

(Testimony of Charles B. Moores.)

and ask you to look at the answer to No. 15, there, which contains a table of figures. A. Yes.

Q. You recall those, do you? A. Yes. [510]

Mr. Jordan: I am going to use my copy so that the Court may have before him the original. Do you have an available copy, Mr. Ferguson?

Mr. Ferguson: Yes, I have.

Mr. Jordan: May we ask you to produce the 1940 report prepared for the Hendy Realization Company by John F. Forbes, a certified public accountant.

Mr. Ferguson: Yes.

Mr. Jordan: I am going to direct your attention to a report of examination of accounts for the year ending December 31, 1940, apparently prepared for Hendy Realization Company by John F. Forbes & Co., certified public accountants, and ask you to look at that report, Mr. Moores.

Mr. Ferguson: Is there a question pending?

Mr. Jordan: There is not. I am only laying a preliminary foundation. Mr. Ferguson, will you stipulate that John F. Forbes & Co. is a firm of certified public accountants?

Mr. Ferguson: Yes.

Mr. Jordan: Q. Do you recall that statement, Mr. Moores? A. Yes.

Q. Do you recall having seen it before?

A. Yes.

Q. Now, I would like to ask you if this statement which you have just examined was ordered

(Testimony of Charles B. Moores.)

prepared by the board of directors by John F. Forbes & Co., certified public accountants?

A. They have been the accountants for the firm for several years and in the normal course of business they would prepare that statement, and they were asked to prepare this one.

Q. They were specifically requested by the board of directors of The Joshua Hendy Company?

A. Yes.

Q. And in due course, after the report was completed I take it [511] it was sent to the Board of Directors by the accountants?

A. I think it was available for the annual meeting in March.

Q. That would have been the annual stockholders meeting?

A. It is dated March 24, 1941, I believe.

Q. That is after the date of the annual meeting, which was on the 17th of March?

A. I guess very likely it was not available. I was under the impression it was available.

Q. In any event, will you say that was received sometime shortly after March 24, 1941?

A. Yes, I presume it was.

Q. It was accepted by the board of directors of the company, was it?

A. I am not sure that the board had a meeting since that date, have they?

Mr. Ferguson: I do not think they have.

Mr. Jordan: There was or was not?

(Testimony of Charles B. Moores.)

Mr. Ferguson: I do not think there was any formal acceptance of the report.

Mr. Jordan: Was there any formal acceptance?

Mr. Ferguson: Not that I know of.

Mr. Jordan: Q. Let me ask you this, Mr. Moores: When this report was received by the company did the company ever act upon it?

Mr. Ferguson: I object to that, if your Honor please, as calling for the conclusion of the witness.

The Court: Sustained.

Mr. Jordan: I would like to introduce this report, your Honor, as Plaintiff's exhibit next in order, which I believe will be No. 3.

Mr. Ferguson: To which I object, if your Honor please, on the ground that no proper foundation has been laid. It is simply a summary or in the nature of a check upon the books of the [512] corporation. The actual evidence is what the books show.

The Court: You have here a report of a public accountant. That report was made from the books of the company.

Mr. Jordan: That is it, your Honor, and it represents their entire report and summarization as to the condition of affairs of the company during the year. It is said that they have been their accountants for years.

Mr. Ferguson: That is true, but, nevertheless, this is not in any respect binding on the company. As to the figures shown, there is no question but what this report is correct, but I submit that is not

(Testimony of Charles B. Moores.)

the proper way to prove financial ability or condition of the company.

The Court: Are you going to offer it?

Mr. Jordan: I am going to offer it.

The Court: If you are going to insist on your objection it may lead to a reference of this matter to an accountant.

Mr. Ferguson: I would like to have it tried here, but I am apprehensive in so doing, that he is going to ask what his opinion is, and we are not going to have a true picture before the Court.

The Court: He is not asking what this witness' opinion is. As I understand it the report has been produced here, a report of a public accountant, of this company, and this report is made after an examination of the books of the company. Now, I take it that it reflects truly the condition of those books.

Mr. Ferguson: That is true.

The Court: It seems to me that it should be admitted here in evidence without any objection, and without requiring the court to continue this case for the purpose of having another examination made of the books of the company, for the purpose of [513] securing another report which would prove only the same thing as this one did.

Mr. Ferguson: In the light of your Honor's remarks I will withdraw my objection, but may it be understood that we do not stipulate to any conclusions. The figures are correct, but any conclu-

(Testimony of Charles B. Moores.)

sions that may be drawn in there are excluded.

The Court: If there are any conclusions in the report that you would want to explain you may.

Mr. Ferguson: That is right. The point is I did not want to stipulate to the report and be denied the right to explain anything that is in the report.

The Court: You have a right to explain anything that is in the report.

Mr. Ferguson: Thank you.

(The report was marked "Plaintiff and Respondents' Exhibit 3.")

Mr. Jordan: Mr. Ferguson, will you please produce the similar annual report of the Hendy Company for the years 1936, 1937, 1938, and 1939?

Mr. Ferguson: In order that we may have a complete picture, I will produce a report for the fifteen months' period from April 1, 1935, to June 30, 1936; another report for the period six months later, ending December 31, 1936; another report for the year ending December 31, 1937; another for the year ending December 31, 1938; another for the year ending December 31, 1939, and 1940 you have already; and I also have a report for the ten and a half months period ending November 15, 1940. I hand you all of those. I think they give a full picture.

Mr. Jordan: I am sure they will.

Mr. Ferguson: It will be stipulated that all of these re- [514] ports were prepared by John F. Forbes & Co. for the Joshua Hendy Iron Works,

(Testimony of Charles B. Moores.)

subject to my explanation with respect to the one that was introduced.

The Court: You are bound by no conclusion stated in the reports, except it is stipulated that the figures contained in them are correct, and if there are any conclusions in them you wish to explain you may do so. They can be marked Exhibits 3-A, 3-B, 3-C, 3-D, 3-E and 3-F.

Mr. Jordan: For the purpose of the record I had better identify them.

The Court: Yes.

Mr. Jordan: I take it that Exhibit 3 will be the 1940 report, being the one first offered. 3-A will be the report of Forbes & Co. dated August 4, 1936, and for the period of fifteen months from April 1, 1935 to June 30, 1936. I will offer that.

I will offer as 3-B the Forbes & Co. report dated April 1, 1937, covering the period of six months ending December 31, 1936.

I offer as 3-C the fourth report, dated February 24, 1938, for the year period ending December 31, 1937.

I will offer as 3-D the fourth report for the year period ending December 31, 1938.

I will offer as 3-E the Forbes report for the year ending December 31, 1939.

I will offer as 3-F the fourth report for a period of ten and a half months ending November 15, 1940.

(The documents were marked, respectively, Plaintiff and Respondents' Exhibits 3-A to 3-F, inclusive.)

(Testimony of Charles B. Moores.)

Mr. Ferguson: Now, Mr. Jordan, I have this addition and [515] offer it to you, it may be of assistance, November 15, 1940—November 15 to December 31, 1940, with sheets of summaries.

Mr. Jordan: May I make this suggestion, that you permit me to examine these during the recess, and if I consider them pertinent I will offer them, and if not you may offer them during your case.

Mr. Ferguson: That is all right. I thought we might complete the picture at one time.

Mr. Jordan: Q. Now, Mr. Moores, directing your attention again to Answer 15 in your sworn answers, appearing on page 15—first, I would like to ask you if you prepared these figures, yourself.

A. No, I did not.

Q. You did not? A. No.

Q. I assume they were prepared for you by your accountant, John F. Forbes & Co.?

A. They were.

Q. Did you instruct Forbes & Co. to prepare this particular portion of your answer?

A. I turned over the interrogatories to them, as I recall it, and asked them to get up whatever account at that time was required, and submitted them to Mr. Ferguson, and he went over them, and then the answer was drawn by him and I signed it.

Q. Then you left the preparation of this table appearing in Answer 15 to the accountants?

A. Yes.

(Testimony of Charles B. Moores.)

Q. Have you any personal knowledge about the figures appearing, at all?

A. Except that they compare by comparison with the statements for those years—I made the comparison, not the net results.

Q. Let me ask you this: Did you, when you received this prepared table, and before you verified the answers, compare the items listed under 1940 as net profit from operations against the 1940 [516] Forbes statement? A. Yes.

Q. You did? A. Yes.

Q. Against the 1940 Forbes statement?

A. Yes.

Mr. Jordan: May I have the 1940 statement, please? Now, the figure which appears in the first line, there, of the table after the designation “Net profit from operations,” in 1940 is \$47,501.77. I am going to ask you to take the Forbes statement and point out where that figure appears, if it does.

Mr. Ferguson: I can save you time if you want.

A. Here it is.

Mr. Jordan: What page is that?

Mr. Ferguson: Exhibit B, page 1.

Mr. Jordan: Q. Now, that figure of \$47,501.77 is given as net profit from operations for 1940 before any income charges are taken into consideration, is it not? A. Yes.

The Court: What are the income charges?

Mr. Jordan: For one, the additional compensa-

(Testimony of Charles B. Moores.)

toin paid of \$102,729.76, which must necessarily be deducted from this net profit from operations.

Mr. Ferguson: If your Honor please, there is just one other point we want to point out, the accountants, here, in auditing these items, have made an income charge for the year of the entire amount of the bonus, so-called, the cash distribution that was made to employees of \$102,729. Now, they did that because they had to put it somewhere. This is only a one-year audit. The fact is that that \$102,000 is, as shown by the resolution, in payment for all of the services for a period of five years, and should have been allocated over the five years, but merely making an audit they attached it to this one year. It should have been allocated over the five years; it having been [517] paid for services for five years, it is improper to charge it in one year, although the payment was made. You cannot charge against earnings for one year a bonus paid for services during five years.

Mr. Jordan: If your Honor please, the only figure in that column which we are questioning is that which refers to net profit from operations. The others have been checked by our accountants, but this figure of \$47,501.77 does not seem to be borne out by their own figures. In other words, it does not truly reflect what actually happened to the company. They did not make a profit of that amount, but they actually wound up with a loss, as shown by

(Testimony of Charles B. Moores.)

their own statement. I will refer you, Mr. Ferguson, to Exhibit B, page 2 of this report, and I will show it to Mr. Moores. Under the heading of "Net loss" it shows \$80,690.43.

Mr. Ferguson: Then there are additional items that show a surplus of \$79,000, and they show the process by which they arrived at each successive figure. You could take that figure out anywhere there and misinterpret it.

Mr. Jordan: Do you expect to have the gentleman here who prepared these reports, Mr. Ferguson?

Mr. Ferguson: That is a problem, the man who actually prepared the reports is not here. If we cannot get him we will have one of his assistants who worked on the reports.

Mr. Jordan: I am not going to pursue the questioning on this line any further, your Honor. You will have somebody here who will be able to explain it?

Mr. Ferguson: We expect to, yes.

Mr. Jordan: Q. Mr. Moores, as a director of the Hendy Company, you naturally had considerable contact with Mr. Bassick [518] during the last three years? A. Yes.

Q. You saw him quite frequently? A. Yes.

Q. He was in poor health during practically all of 1940, was he not? Yes, he was.

Q. To the extent that there would be long periods of time during which he would not be able to come to the office?

(Testimony of Charles B. Moores.)

A. No. It seemed like a miracle that he was there, but he was there.

The Court: What was he suffering from, Mr. Moores, do you know?

A. I don't know exactly, your Honor, he was a Christian Scientist and they won't admit anything wrong.

Mr. Jordan: Q. As a director of the company, Mr. Moores, did you feel, in November, 1940, prior to the sale of the plant, that the business of the Hendy Company could not be successfully and profitably conducted after November 4?

A. Did I feel it could not be?

Q. Yes. A. No.

Q. You felt that it could be conducted profitably?

A. Yes, sure, subject to the usual hazards of business.

Q. The Bank of California was a stockholder of the Hendy Company at the time that the plant was sold in November of last year, was it not?

A. The Bank was the actual owner, but the stock was in the name of a nominee.

Q. Do you recall the total number of shares that were owned by the bank immediately prior to the sale? A. 400.

Q. Do you know when the bank acquired those shares?

A. It acquired them by way of pledge sometime prior to 1923.

(Testimony of Charles B. Moores.)

Q. By way of what?

A. By way of pledge, as security for a note.

Q. It was a note executed by Mary F. McGurn?

A. Yes. [519]

Q. Mary F. McGurn died sometime prior to June, 1920, did she not? A. Yes.

Q. And on or about June 1, 1920 the Bank of California filed a claim against her estate for \$16,717.09, is that correct? A. Approximately.

Q. That claim was secured at that time by what?

A. 500 shares of the Joshua Hendy Iron Works.

Q. 861½ shares, was it not?

A. No, the claim was secured by 500 shares. There were 861½ shares in the Estate of Mary McGurn, and there was an exchange for 430¼ shares at the time of the deposit, and that is when we learned there was additional stock, when we surrendered her 500 shares for the voting trust certificates. We found that there was an additional holding, but it was not pledged.

Q. But you only had a pledge lien on the McGurn shares through all of those years up to September of 1940, is that correct?

A. No, we had a pledge—you mean up to the time of her death; then we had a claim against her estate. The pledge lien up to 1920 was against 500 shares of stock.

Q. In any event, you were not paid on your claim against the Estate of Mary F. McGurn at any time, were you, in cash? A. No.

(Testimony of Charles B. Moores.)

Q. You received, in fact, nothing of any kind in payment of that claim until——

A. June, 1940.

Q. When?

A. When we got the liquidating dividend on the stock.

Q. I am trying to locate the claim here, but I think you received satisfaction of that claim on September 20, 1940, do you recall that?

A. It may have been.

Q. As a result of a compromise between the bank and Mr. Charles C. Gardner, who is the heir of Mary F. McGurn the bank acquired [520] 430³/₄ shares, did it not? A. Yes.

Q. Of the stock of the Hendy Company?

A. Yes.

Q. And in consideration of the receipt of those shares extinguished the old indebtedness and claim against the estate of Mary F. McGurn?

A. That was the only assets of the estate, other than a lot down in South San Francisco, which we did not consider had any value.

Q. So that it was only on or shortly after September 20, 1940, that the Bank of California became the legal owner of any shares of stock in the Hendy Company?

A. They actually owned the stock as of that date, yes.

Q. And the stock was then transferred to the bank's name on the books of the corporation?

(Testimony of Charles B. Moores.)

A. To the Fresno Land Company.

Q. As assignee for the Bank of California?

A. No; they were the nominees.

Q. That was sometime shortly after September 20, 1940? A. Yes.

Mr. Jordan: I think that is all.

Mr. Ferguson: That is all.

Mr. Jordan: By the way, Mr. Ferguson, have you been able to locate Mr. Bassick since yesterday?

Mr. Ferguson: No.

Mr. Jordan: You have not any idea to-day where he could be located?

Mr. Ferguson: No. [521]

ROBERT M. GANE,

Called for the Plaintiff; Sworn.

Mr. Jordan: Q. Mr. Gane, you are a certified public accountant? A. I am.

Q. How long have you been engaged in the practice of accounting?

A. In public practice about seventeen years.

Q. Are you associated with any firm of accountants?

A. I am with F. W. Lafrentz & Co.

Q. Where are the offices of your firm located in San Francisco?

A. In San Francisco in the Mills Building.

Q. What is your firm name?

(Testimony of Robert M. Gane.)

A. F. W. Lafrentz & Co.

Q. Does the firm of F. W. Lafrentz & Co. have offices elsewhere than in San Francisco?

A. Yes. We have about fifteen offices in principal cities throughout the United States, such as New York, Chicago, Washington, D. C., Cleveland, and so on.

Q. You are a partner in that firm, are you?

A. I am.

Q. Where did you receive your professional training, and what degrees do you hold?

A. I have a degree of Certified Public Accountant, or C. P. A., and received that as a result of State examination in California.

Q. Are you at the present time connected with any school of accounting, and if so, for how long?

A. Yes, for about twelve years I have been President of the San Francisco Institute of Accounting; that is a non-private school of collegiate grade.

Q. Are you a member of any professional associations or societies?

A. Yes, I am a member of the American Institute of Accountants, the National Association of Cost Accountants, and the California State Society of Certified Public Accountants, Past President of the San Francisco Chapter.

Q. Have you had an opportunity to examine the financial [522] report prepared by John F. Forbes & Company, Certified Public Accountants, for

(Testimony of Robert M. Gane.)

Hendy Realization Company, formerly known as Joshua Hendy Iron Works, for the years 1936 to 1940, inclusive? A. Yes.

Q. I might say for your information, Mr. Gane, those reports have been introduced in evidence here as Plaintiff's Exhibits 3, 3-A to F, inclusive. When and at whose request did you examine those reports, Mr. Gane?

A. In May or June of this year, at your request.

Q. Those reports are purportedly based upon and contain figures taken from the books and records of the Hendy Realization Company.

Mr. Ferguson: One moment, it calls for a conclusion of the witness. He cannot possibly know what they contain.

Mr. Jordan: I said "purportedly."

The Court: Do you deny it?

Mr. Ferguson: No, I don't know what he has examined, if the Court please.

The Court: He says he examined the Forbes reports.

Mr. Jordan: Q. I will hand the witness Plaintiff's Exhibits 3 and 3-A to 3-F, inclusive, and ask you to look at them carefully. These are the reports which I furnished you and which you examined in the spring of this year.

A. There are two reports here which I did not have for examination, but the others are the reports that I examined, or copies of them.

(Testimony of Robert M. Gane.)

Q. Can you identify for us the two reports by exhibit number that you did not examine?

A. The reports marked 3-A and 3-F are the two that I did not examine.

Q. Would you say what the period covered by 3-A is?

A. 3-A covers the period from April 1, 1935 to June 30, 1936.

Q. And 3-F covers what?

A. 3-F covers the ten and one-half [523] months period ending November 15, 1940.

Q. But your examination did include an examination of the reports for the entire year of 1940?

A. It did.

Q. Mr. Gane, in testifying at this time regarding your finding and the result from your examination of these various reports that you have just identified, you have assumed, have you not, that all of the figures and other data that are contained in these reports purportedly reflect the company's affairs and records?

A. Yes, I have confidence in the accountants who prepared these reports, and while not accurate there are certain minor adjustments—I should say while there are certain minor adjustments reflected in the reports from period to period in the aggregate they would reflect that condition.

Q. You made your examination upon that assumption? A. Yes.

(Testimony of Robert M. Gane.)

Q. For what purpose did you examine these various annual reports of the Hendy Company?

A. For the purpose of gauging the result of the operations throughout the period and comparing the financial condition at various times.

Q. When you refer to the period you refer to what period?

A. The entire period of, close to five years that they covered.

Q. And that would be from March 24, 1936 to the end of December, 1940?

A. That is correct.

Q. Did you at the time of your examination of these reports take any notes or make a memorandum or summary of the material contained in them?

A. I made various notes and a summarization from the reports.

Q. Have you those notes and summarization with you? A. I have.

Q. I am about to ask you some questions and before I do so I want to ask you to please restrict your testimony as much as possible to ultimate findings and avoid any unnecessary delay. [524]

Mr. Ferguson: If your Honor please, preliminarily I would like to ask what the purpose of this line of inquiry is, what it is intended to elicit by this witness.

The Court: You may state what your purpose is.

Mr. Jordan: I expect to elicit from this witness in as simple form as possible his interpretation of

(Testimony of Robert M. Gane.)

these reports for the period from March, 1936 to the end of 1940, so as to give your Honor a picture of the financial condition of this company when the plan of reorganization was confirmed, its condition at the time of the sale of the plant, and its intermediate progress during that period.

The Court: Yes.

Mr. Jordan: That is my purpose in asking the following questions of this witness, and I think I can assure you, and I believe that Mr. Gane will assure you he is not going to go into a great mass of figures. He is going to give your Honor, to the best of his ability, ultimate results.

Mr. Ferguson: If that be the purpose, if your Honor please, I object to any inquiry along this line or any testimony, for two reasons. First, this witness has said that these reports correctly disclose the facts which he obviously knows nothing about, but the more important thing is that it is an entirely improper way to elicit the facts. The figures are written in the annual reports from the books, and it is usurping the function of the Court to have an expert, if that be what he is attempting to qualify as, say what his opinion of the books and figures is.

The Court: The Court certainly has to have some information from an expert on these matters. You cannot expect the Court to take these books and examine them and take the figures down [525] and arrive at the conclusion that you think the

(Testimony of Robert M. Gane.)

Court should. I must have some assistance. I must have the assistance of this expert, and maybe the assistance of an expert that you will produce. I think it would be very interesting to hear what the witness has to say about these reports and what they show.

Mr. Ferguson: My objection is overruled?

The Court: Yes. You know what weight the Court usually gives an opinion on a fact. Sometimes the Court entirely disregards it, but the evidence is certainly admissible. Now, after this witness gives his testimony and after your expert has given his testimony, if it appears to me it is necessary for further examination of these books for an accounting to be taken, it will be taken. The objection will be overruled.

Mr. Ferguson: Then, if your Honor please, I would like to ask one or two questions.

The Court: Very well.

Mr. Ferguson: Q. You say that you did not examine Exhibit 3-A, which covers a period from April 1, 1935 to June 30, 1936?

A. I did not examine that one.

Q. In arriving at your interpretation what figures did you use, then, as reflecting the condition of the corporation immediately following the confirmation of the plan before March, 1936?

The Court: Is there any reason why these reports should not be shown to this witness?

Mr. Ferguson: If your Honor please, I furnished them with all that I had.

(Testimony of Robert M. Gane.)

The Court: I think the reason that 3-A was excluded was because it was not necessary to examine it. The testimony shows that separate reports cover the time from March 24, 1936 to the end of 1940, and I thought that was the entire period which is [526] under investigation here.

Mr. Ferguson: That is the purpose of my inquiry. I do not believe that is the fact. I think Mr. Gane will say that the period he examined started July 31, 1936.

The Witness: No, that is not correct. I started with the balance sheet shown in the printed plan of reorganization and traced all figures through from that to the end of December, 1940.

Q. The balance sheet figures for July 31, 1935?

A. Yes, I started with that and the opening figures of the 1936 statement differ from those figures by some \$7700, which represents accruals in that interim.

Q. Had not the plant inventory been written down from some \$700,000 a figure of \$200,000?

A. Not before the beginning of the period covered by the first report. They were written down \$399,000 during the initial period of the April 1st report.

Q. I understood you to say that you traced it against the 1936 statement.

A. No, I might have misstated that answer; the fact is at the beginning of the 1936 statement.

(Testimony of Robert M. Gane.)

Q. What did you take to be the beginning of the 1936 statement?

A. The initial deficit figure at that time, which was in round figures \$237,000 instead of about \$229,000, or pretty close to \$230,000 as shown by the balance sheet in the plan of reorganization.

Q. But that is a figure dated March 31, 1935, isn't it, that is not 1936, the \$237,391.37?

A. That is a deficit figure shown by the December 31, 1936 report of John F. Forbes & Company. We have that report there.

Mr. Jordan: I do not believe that is voir dire examination as to the qualifications of Mr. Ferguson.

Mr. Ferguson: All right, I will withdraw it. I wanted to [527] find out what the basis of his testimony was.

The Court: I think perhaps this witness' testimony will be made clear, and if it is not you will have an opportunity to bring it out on cross-examination.

Mr. Jordan: Q. Mr. Gane, refreshing your recollection from such notes and memoranda as you took from these various Forbes reports, which are in evidence, will you describe the financial condition of this company to the Court on March 24, 1935, as simply as you can, that being the date on which the plan of reorganization was confirmed.

A. In round figures, by figures which are very close, approximating the actual ones, the condition

(Testimony of Robert M. Gane.)

at that time was represented by working capital of approximately \$95,400, plant and other fixed assets of approximately \$724,600, making a total of assets of \$820,000, against which there were liabilities in the form of secured and unsecured five-year notes of \$550,000, or there was a net asset value at that date of about \$270,000. Converting that in terms of book value of 2212½ shares of stock in the hands of stockholders that represented a book value of roughly \$122.

Q. Now, commencing with the date March 24, 1936, will you describe to the Court the financial condition of this company as it developed progressively through to the end of 1940, as revealed by the Forbes reports?

A. This may not be in order, your Honor, but I would like to ask a question as to whether it is permissible to give a summary figure which will cover that entire period, or whether it is desired I give detailed figures year by year.

Q. I will answer that by asking you another question, Mr. Gane, you probably know better than I would about this; I wish you would give it to us in the manner that you believe would bring the matter more clearly to the Court's mind. [528]

A. I think a summary picture of the entire operation would be more comprehensible than the great list of figures required to cover it period by period.

Q. If you feel that you can give us a comprehensive summary in simple language for this period in question please give it to us that way.

(Testimony of Robert M. Gane.)

A. Then I can easily amplify those figures.

Q. If Mr. Ferguson wishes you to do so.

A. The change in the position as stated in answer to a previous question can be represented in part by adjustment of the opening position, too in part by the result of transactions that occurred. The adjustments represented—

Q. May I interrupt, will you tell us what you mean by adjustments?

A. By adjustment I mean mere changes in the books or the write-off of liabilities which existed at that time, things which were not representative of operations.

Q. Would you refer to an adjustment as a reduction by 10 per cent. under the plan of the outstanding obligations at the time it was confirmed?

A. Yes. Those adjustments, then, consisted of the reduction of liabilities of the plant in an amount of \$73,853, and reduced by other adjustments of the opening balance sheet, a net amount of decrease in that, or increase in liabilities of \$8533, or there was a net reduction of the opening deficit in the amount of \$65,319.76 through this adjustment that I mentioned. Then the operation resulted in the following item——

Q. Pardon me, Mr. Ganes. You were about to tell us about operations during the period from March 24, 1936 to the end of December, 1940.

A. That is correct.

(Testimony of Robert M. Gane.)

Mr. Ferguson: You mean figures covering the whole period at once?

A. The figures cover the whole period at once, and are [529] a net of those periods; the profit from the main and incidental operations, that means profit of a certain period reduced by losses in others amounted to \$96,924. A further discount of liabilities amounted to \$19,632.

Mr. Jordan: Q. Does it appear from these reports how those liabilities were discounted for the total amount that you have just given?

A. That figure that I gave is a composition of figures of the various years, and they do not all result from the same transactions, and it was by paying liabilities at an amount less than previously stated.

Q. Would you say those liabilities had been a portion of the deferred obligations or liabilities of the plant under the plan of reorganization?

A. They were.

Q. In other words, as I understand it, the company, through this period under discussion, saved \$19,632.27 by going out and compromising with the deferred creditors under the plan of reorganization at less than 100 per cent. on the dollar?

A. That is substantially correct.

Q. If it is not entirely correct will you correct me?

A. The only reason that I qualify it at all is I am not certain that they did go out and settle, or

(Testimony of Robert M. Gane.)

whether somebody offered to take less, or just exactly how it came about.

Q. But that was the result?

A. The result was that they paid less than the amount previously stated in the obligation. There was a further item of benefit, which was the acquisition of a certain amount of stock at a reduction from the par value, that reduction being \$26,672.

Q. Will you explain to us how that operated, just how that was brought about, as well as you can tell from the reports?

A. As well as I remember the situation it was a case where a [530] stockholder owed an amount slightly less than \$4000 to the company, and surrendered her stock, which amounted to somewhat over 300 shares, I think 305 shares, and a fraction, approximately that, to the company, in satisfaction of that debt.

Q. What happened to that stock?

A. The stock was returned to the treasury of the company.

The Court: That was the stock was cancelled?

Mr. Jordan: That is right, that is what brings about the reduction in the total of outstanding shares at the time the plan was concerned. You recall there was 4425 shares. There are now outstanding in the hands of the old stockholders 1907 $\frac{3}{4}$ shares, and 2212 $\frac{1}{2}$ shares with Mr. Bassick, Mr. Hyland, and Mr. Levit.

A. The total of benefits—

(Testimony of Robert M. Gane.)

The Court: You mean profits?

A. These are not profits. The profits only amounted to \$297,000, and these other items, while not profits, were of benefit to the corporation. That is why I used that unorthodox term; the total of those benefits was \$143,229.42.

Q. That includes the profits?

A. That is including profits, discount of liabilities and acquisition of stock at a discount, \$143,229.42.

The Court: We will take a recess until two o'clock.

(A recess was here taken until two o'clock p. m.)

[531]

Afternoon Session—2:00 O'clock.

ROBERT M. GANE,

Direct Examination

(resumed)

Mr. Jordan: May I have the last answer read?

The Court: Read it.

(Record read by the Reporter.)

A. That was only part of the answer, your Honor.

The Court: Do you wish to finish it?

A. I do.

Q. Pardon me, do you have an extra copy of that? A. Yes.

(Testimony of Robert M. Gane.)

Mr. Ferguson: This may be understood to be for the purpose of illustrating this gentleman's testimony?

The Court: Oh, yes.

A. The total of these items which I gave and which have the effect of improving the position is \$143,229.42. Against this there is what I consider a loss on the sale of the plant and which I will explain later of \$189,767.13, and a loss on the sale of other capital assets of \$1790.16, or a total loss of \$191,557.29. Those figures represent a net increase in the company's deficit during this period of almost five years in the amount of \$48,327.87. Now, the changes that I have given can be reconciled with the opening and closing figures of the Forbes reports in this way: The deficit that the Forbes reports show at the beginning of the period was \$237,391.77. This deficit was reduced by the adjustment of the initial liabilities and assets by the inauguration of the plan and subsequent changes in that opening balance sheet amounted to \$65,319.76, that I explained before, giving us an adjusted opening deficit of \$172,072.01. Then the increase in the deficit, which I just explained, amounted to \$48,327.87, and that added to the adjusted opening deficit produced the closing [532] deficit as shown by the Forbes reports, which was \$220,399.88.

The Court: What is the result of those figures?

A. The result, if any, is that during the period of operations that is, the period of very nearly five

(Testimony of Robert M. Gane.)

Q. At the top of the memorandum that you have handed to me on March 24, 1936 you give a figure of \$820,000 as the total value of the fixed assets.

A. Pardon me, your Honor, that is the total of the fixed assets and the working capital. The value of the fixed assets at that time was stated as \$724,600, that is the figure immediately above it, and since that time, represented by those figures, there had been—I do not want to give the figures, but there had been large additions to the fixed assets, and then they had also been reduced by depreciation and sale of some parts of them.

Q. Well, then, when you subtract from the amount which you have here and which was given to me, of \$724,600, when you subtract [534] from that all the deficits and deductions that should be made, what have you then as the total fixed value of the plant at the end of this five-year period and before the sale?

A. That figure arrived at in a different way would be, I think I said \$617,000, but computing it in the manner that you indicated it would require an adjustment for all of the depreciation figures throughout the period additions and deductions, and would require a little time to compute. The result, though, would be approximately the figure I have given.

Q. \$617,000?

A. That is right, your Honor. That applies only to the assets which were sold, not to the San Francisco assets retained.

(Testimony of Robert M. Gane.)

Mr. Jordan: Q. Mr. Gane, in your opinion, and basing your answer upon the financial reports, have the affairs of the Hendy Company improved financially between March 24, 1936 and December 20, 1940? A. Well—

Q. Let us take November 4, 1940.

A. Can you identify that date?

Q. November 4, 1940 is the date upon which the board of directors voted to grant the option to sell the plant.

A. Well, about 51 or 52 per cent. of the liabilities existing at the commencement of operations under the plan had been retired. There was an improvement. From another standpoint, that is to say, from the standpoint of stockholders equities and the position of the company other than retirement, paid, there had not been an improvement.

Q. Such improvement as there was was occasioned by the writing off of some deficit?

A. The writing off of indebtedness after the inauguration of the plan.

Q. And the wiping out of 50 per cent. of the value of the stock? [535]

A. That I had not considered in making any comparison; I merely had computed the stock as remaining, as long as the stockholders owned all of the stock that was outstanding; whether it was half of what they previously had or not there would be no change, so far as the treatment of that stock is concerned. The only time that there would be

(Testimony of Robert M. Gane.)

a change in the interest of the stockholders would be when that stock became owned by someone else, so that there would be another interest in the net assets.

Q. Mr. Gane, have you examined the plan of reorganization of the Joshua Hendy Iron Works?

A. I have.

Q. Approved by the Court on March 24, 1936?

A. I have.

Q. And you have read paragraphs 6-G and H of the plan, have you not? A. Yes, I have.

Q. I think I had better refresh your recollection by showing you a copy of the plan, and you can again read, if you like, those particular paragraphs.

A. I think that is sufficient to refresh my memory.

Q. Now, will you state whether or not the term "rehabilitation" has a definite and well-established significance in the field of accounting?

Mr. Ferguson: If your Honor please, that is immaterial, whether it has or has not. The question is, how was the term "rehabilitation" used in the plan and what was its legal meaning in the plan, and this is not the way to elicit this type of evidence.

The Court: Sustained.

Mr. Jordan: Q. Mr. Gane, in the light of your experience as an accountant and taking into consideration the information which you have ob-

(Testimony of Robert M. Gane.)

tained regarding the business operations and financial condition of the Hendy Realization Company during the [536] period from March 24, 1936 to the end of December, 1940, as reflected by the annual Forbes reports for that period, have you an opinion as to whether or not the affairs of this company had become successfully rehabilitated on December 20, 1940?

Mr. Ferguson: The same objection, if your Honor please.

The Court: He is asking now if he has an opinion. He is not asking him what the opinion is. It probably calls for a "Yes" or "No" answer.

Mr. Ferguson: I withdraw the objection to the question.

The Witness: A. I have.

Mr. Jordan: Q. Will you state what that opinion is?

Mr. Ferguson: Now, if your Honor please, I will object on the ground that it is the issue in controversy. That is not the way to prove an issue in this case. This witness has testified—

The Court: Do not argue. Just state your objection.

Mr. Ferguson: I submit, if your Honor please, this witness is not qualified, no proper foundation laid, and it calls for the conclusion of the witness, and improperly impinges on the Court's evidence.

The Court: Sustained.

Mr. Jordan: Would it be in order for us to

(Testimony of Robert M. Gane.)

offer in evidence the memorandum which Mr. Gane prepared?

The Court: It can be offered in evidence merely as illustrative of his testimony. I do not see any objection to it.

Mr. Ferguson: If that is the sole purpose.

Mr. Jordan: Yes. It summarizes your testimony as you have given it, Mr. Gane?

The Court: You have used it, and the witness has used it in giving his testimony.

A. That is correct. [537]

Mr. Ferguson: I suppose inasmuch as I objected to this line of testimony I should object on the same ground.

The Court: Overruled.

Mr. Jordan: I would like to offer this as Plaintiff's Exhibit next in order.

(The summary was marked "Plaintiff's Exhibit 4.")

Q. Mr. Gane, in addition to examining the Forbes statement covering this period which we have been discussing you also examined the sworn answers to the interrogatories which were propounded by Behneman & Shores in this matter, did you not? A. That is correct.

Q. And the answer sworn to by Mr. Moores?

A. I did.

Q. Taking the statements of John F. Forbes & Company and the answers to the interrogatories, were you able to determine the total amount of sal-

(Testimony of Robert M. Gane.)

aries and extra compensation paid by the Hendy Company to Mr. Bassick, Mr. Hyland, and Mr. Levit during this entire, almost five-year period?

A. Yes.

Mr. Ferguson: One moment, if your Honor please. Are you going to attempt now to alter the stipulation you entered into in the record yesterday?

Mr. Jordan: No, I am not. There is no question about the amount. This is preliminary.

Mr. Ferguson: Then what is the purpose of the inquiry, if I may ask?

Mr. Jordan: I am simply laying the foundation for further questions.

Mr. Ferguson: If your Honor please, I submit before we lay ourselves open we ought to know what the type of investigation is going to be. I have stipulated what these salaries and bonuses were.

[538]

Mr. Jordan: All right, I think you are entitled to it. It was stipulated that the total was \$174,835.89. That is right, is it not? If I am wrong you check me.

The Court: That has already been gone into.

Mr. Jordan: The thing I am leading up to, your Honor, is this, we have stipulated to the total amount.

The Court: If that is stipulated to that ought to be sufficient.

Mr. Jordan: We have the amount of the first liquidating dividends which totaled \$85,848.55 paid to the old stockholders, and we also have in evi-

(Testimony of Robert M. Gane.)

dence the estimate that will be a sum approximating \$15 a share additional liquidating dividends to be paid on all of the outstanding stock. I have asked Mr. Gane to calculate, with those figures, and taking into consideration that estimate, the total amount that would be received from the company by Mr. Bassick, Mr. Hyland, and Mr. Levit during this five-year period in the way of salary, additional compensation, and by way of any further liquidating dividends they receive on the 2212½ shares as against the amount heretofore received by the stockholders, plus the estimate of \$15 a share that they will receive. I think it may be helpful to your Honor to get those figures.

The Court: Yes, I would like to have them.

Mr. Ferguson: Might I inquire from Mr. Jordan off the record, I do it in an effort to shorten the matter.

Mr. Jordan: Is there any question left in your mind about this figure of \$174,835.89? I believe you stipulated to that yesterday, but let us clear it up.

The Court: Yes, it has already been stipulated to.

Mr. Jordan: Now, will you state, Mr. Gane, what percentage [539] of the total of the salaries and extra compensation paid to Mr. Bassick, Mr. Hyland, and Mr. Levit, plus the anticipated payment to them of \$15 a share on their 2212½ shares, how that would bear to the total amount to be distributed by the company, which would, in addition, include the \$85,848.75 heretofore distributed to the

(Testimony of Robert M. Gane.)

old stockholders of the Joshua Hendy Iron Works, plus \$15 a share anticipated liquidating damages?

Mr. Ferguson: Your Honor, the witness may give an answer which signifies nothing, because it is comparing unlike things. What they have done is taken in lump in all of the salaries plus bonuses, plus everything else, and they are trying to compare that with the dividends.

The Court: I do not know as to the comparison, but it seems to me an effort should be made to show the total amount of money received by these parties, including the amount they would receive on the stock at \$15 a share.

Mr. Ferguson: If it will be received. Of course, that is a pure estimate.

The Court: It is a pure estimate. They have already received \$174,835.89?

Mr. Ferguson: Yes.

The Court: If they are to receive something in addition what is the amount that they would receive? Isn't that what you want?

Mr. Jordan: That is right.

The Court: You want to add that to this \$174,835.89?

Mr. Jordan: Yes.

The Court: Let us have that, if you have computed it.

Mr. Jordan: Q. You have computed those figures, have you not?

A. Yes, I have computed them. [540]

(Testimony of Robert M. Gane.)

The Court: Make it clear, Mr. Jordan.

Mr. Jordan: Q. Mr. Gane, will you give us, taking into consideration all salaries and extra compensation paid up to this time to Mr. Bassick, Mr. Hyland, and Mr. Levit, and anticipated future liquidating dividends to be paid to them on their 2212½ shares of stock, and in giving that total amount add salaries and bonuses and the anticipated dividends, and then give the amount that will be paid to the old stockholders on the 1907¾ shares, that is the amount heretofore paid and the estimated amount to be paid at \$15 a share, and then comparing those totals give us the percentage proportion that would be withdrawn from the company by those two groups.

A. The amount that has been paid to the officers, as stated, was \$174,835.89, and on the basis of the estimated future distribution of \$15 a share they would receive on 2212½ shares \$33,187.50, or a total of \$208,023.39. The stockholders received on the first liquidating dividends \$85,848.75, and on the basis of the estimate used before they would receive on their 1907¾ shares \$28,616.25, or a total to the stockholders of \$114,465. The total paid out to both groups would be \$322,488.39, and the amount paid to the stockholders, paid and to be paid to the stockholders, would be 35.49 per cent.

Mr. Ferguson: One moment, I have an objection to any comparison because they are not comparing the right thing.

(Testimony of Robert M. Gane.)

The Court: I understand. So far as the answer to the question is concerned it is mere argument.

Mr. Ferguson: I think most of his testimony has been.

The Court: That is all right. I want to hear it. I will accept it as argument on the part of Mr. Jordan. Give me the percentage.

A. The percentage paid to the stockholders [541] would be 35.49 per cent. and to the officers 64.51 per cent. of the total amount paid out.

Mr. Jordan: Q. Mr. Gane, I am going to show you a typewritten summary such as you have just given us, and ask you if that is the substance of your testimony that you have just given on this subject? A. Yes, I prepared it.

The Court: Do you want to offer this in evidence?

Mr. Jordan: Yes. I would like to offer that in evidence as Plaintiff's Exhibit 5.

Mr. Ferguson: The same objection, if your honor please.

The Court: Strictly speaking, your objection is good, Mr. Ferguson, but I am going to receive that, as I said, I will receive that as a part of Mr. Jordan's argument in this matter. It is something that I want somebody to figure out for me, and I am glad to have the witness do it. With that statement your objection is overruled.

(The document was marked "Plaintiff's Exhibit 5.")

Mr. Jordan: That is all. You may cross-examine.

(Testimony of Robert M. Gane.)

Cross-Examination

Mr. Ferguson: Q. Your conclusions to which you have testified in chief, Mr. Gane, were predicated, as I understand it, upon and solely upon the annual reports of Forbes & Company, is that correct?

A. Some of those were. Others were based upon the answers to the interrogatories in the case. I believe those were the two sources.

Q. Then with respect to values and current assets, fixed assets, etc., did you take the figures in the Forbes reports?

A. I think that it is correct to say that in all cases the figures I used came from the Forbes reports.

Q. That is not true with respect to fixed assets, is it? Is it not a fact that the fixed assets in the Forbes reports [542] for all the years involved sums of \$300,000 or \$400,000 less than the figures you used?

A. No, that is not correct. In the opening balance sheet of the Forbes statement that I used those fixed assets were stated without that reduction of almost \$100,000.

Q. But you have ignored those portions of the Forbes reports where they have created a value?

A. No, that is not correct. I used the reduction in value for what it is purported to be, which is an adjustment made to the books, but not one which represents an adjustment of assets or transaction

(Testimony of Robert M. Gane.)

in any way. The Forbes report which reflects the sale treat the result of that sale in that having previously adjusted a deficit account for the write-down of these assets have accordingly adjusted the deficit account for what is then termed a profit from that sale.

Q. But in arriving at your final result you have not given any effect at all to the fact that those assets were written down, have you?

A. Yes, I have.

Q. Where, in what way?

A. In that I have considered that write-down in my figures.

Q. What the plant was sold for and what it had been originally put in the books for was what you called loss on the sale. Where does that give effect to the write-down in the assets?

A. That particular point seems to me to be a mere question as to the term or language used. As between the opening balance sheet and the closing balance sheet, it seems to me to make no difference whether we say we write the assets down and then say we sold them for \$180,000 more than the write-down, or whether we say we took the original figures and sold them for \$190,000 less than that. It is the same thing in the end.

Q. Well, now, my question, which you have not yet answered, is [543] did you give any effect to write-down, and the answer is you did not give any effect to the write-down, did you? A. I did.

(Testimony of Robert M. Gane.)

Q. In what way? You have not answered that. How did you give any effect to the write-down? You have taken the value before it was written down of the fixed assets, and you have taken the sales price of the plant, and you have compared the two, and you say the difference is loss in value in the plant and deficit in the sale of the plant. Where in that computation have you paid any attention to the write-down effect in all of those years?

A. I did not take the figures that you mentioned, but instead I took the write-down of the plant and deducted from it the profit to arrive at the loss figure that I used.

Q. You testified on direct examination you got the answer working backwards, to find out what the value and what the loss on the sale was. Is that customary in accounting practice?

A. I do not like to seem to contradict you, but I do not think I testified to the effect that I got the answer working it back, but I think I testified that I used two factors involved in the recording of this particular transaction, and used those to arrive at the answer.

Q. What were those factors?

A. Those factors were the adjusting entry on the books in 1936 and the profit shown on the adjusted figures in 1940.

Q. Didn't you say to Judge St. Sure the value at the end of the five years immediately before the sale was \$617,000, and by working backward and

(Testimony of Robert M. Gane.)

working right down to \$390,000 you found the values to begin with?

A. That is correct, but that is a different computation, and as I explained at the time it would take considerably more time to work out the answer to that [544] question by using the asset figures and the various adjustments to them, but by taking a short cut I could arrive at the same result by a simple computation.

Q. What did you do with depreciation in the meantime?

A. Depreciation in the meantime had been shown or its effect had been shown in the figures that I used.

Q. Depreciation is only shown in the reports on the basis of lower valuation, is it not?

A. That is correct.

Q. In figuring the value between the \$724,000 odd that you started with and \$617,000 that you finished with, what did you do with depreciation?

A. I took depreciation as shown by the reports because I felt that the fact that the write-down of those assets would result in a reduced depreciation and therefore an increased profit would not change it; the adjustment would be in the ultimate profit or loss shown in the sale. I considered that would have no effect on this case.

Q. You have that depreciation in assets with \$724,000—

A. (Interrupting) I do not recall the figures that you are using—

(Testimony of Robert M. Gane.)

Q. (Interrupting) The depreciation was \$300,000?

A. According to accepted principles of accounting in these statements depreciation on the gross amounts has been used.

Q. Is that what you applied?

A. No, I took the figures according to the Forbes reports.

Q. Irrespective of the fact that they had written it down from \$724,000 to \$300,000?

A. Yes, as I explained the reason for that is that the net result would be the same, for the simple reason that the greater amount of depreciation taken the greater amount of profit or smaller amount of loss on sale, and the greater amount of depreciation taken the lower would be the profit from year to year. [545]

Q. Did you read those portions of the Forbes reports with respect to the write-down of values?

A. I did, and if I remember it was stated in the report that the write-down of value was on the basis of appraisals which had not been submitted to them.

Q. Didn't they state they were on the basis of appraisals which had been made in the reorganization proceeding before this Court?

A. That is not my recollection of the statement. If I may have it, I will be glad to read it.

Q. I will refer you to Plaintiff's Exhibit 3-A, page 5 (reading).

(Testimony of Robert M. Gane.)

A. It says no detailed appraisal report was available for our inspection.

Q. But did you read that portion of it which is stated it was made during the course of the proceeding? A. Yes, I read that.

Q. You still submit that it had been given no consideration?

A. Not from the standpoint of arriving at a profit on the sale of the plant.

Mr. Ferguson: I have no further questions.

Mr. Jordan: That is all.

Mr. Jordan: Mr. Ferguson, I have gone through this copy of the stockholders meeting on November 15, 1940, which contains a part of the minutes and option in favor of MacDonald & Kahn, Inc., dated November 4, 1940, and I will, with your Honor's permission, offer the entire copy of the minutes of this particular meeting in evidence as Plaintiff's Exhibit next in order.

(The document was marked "Plaintiff and Respondents' Exhibit 6.") [546]

ALFRED J. MAYMAN,

Called for the Plaintiff and Respondents; Sworn.

Mr. Jordan: Q. Mr. Mayman, you are an assistant cashier of the Bank of California, National Association, are you not? A. I am.

Q. How long have you been with the bank?

(Testimony of Alfred J. Mayman.)

A. A little over twenty years.

Q. A little over twenty years? A. Yes.

Q. And from April 8, 1936, up to March 17th of this year, you continuously acted as a director of The Joshua Hendy Iron Works, did you not?

A. I did.

Q. You are not on the board at the present time, are you? A. I am not.

Q. In addition to being a director of the company were you, during the period that I have mentioned, also an officer of the company?

A. A part of the period.

Q. Well, for what period were you an officer?

A. I take it back. The first year of the period we were discussing I was assistant secretary-treasurer, and after that secretary.

Mr. Ferguson: I believe he was appointed assistant secretary-treasurer on April 22, 1936, and secretary on March 15, 1937. The minute book so shows.

Mr. Jordan: Q. That refreshes your recollection, does it, Mr. Mayman? A. Yes.

Q. We will accept that. On the first occasion when you were elected to the Hendy board you were nominated by the Bank of California, were you not, to the board? A. That is right.

Q. You were the bank's representative on the board during the entire period of time that you served?

A. In so far as the directors represented any in-

(Testimony of Alfred J. Mayman.)

terest, but I really represented the [547] company.

Q. But you were on the board at the nomination of the bank? A. Yes.

Q. You had charge, I believe, of the taking in of the outstanding trustees receipts and certificates that had been in the hands of the old stockholders and issuing in exchange for them new certificates of stock in the Hendy Realization Company after the voting trust had been terminated on or about December 21, 1940? A. That is right.

Q. First of all, going back to the spring of 1940, in May and June, I believe, do you recall that certain negotiations were had between yourself and myself and Mr. Ferguson with respect to the surrender by Dr. Behneman of his outstanding shares in the Hendy Company to the voting trustees, in exchange for voting trust certificates?

A. There were some negotiations, I don't recall the date, Mr. Jordan, but I think they might have been about that time.

Q. Would your recollection go to this extent, to say that it was in June of 1940 that the voting trust certificates were actually issued to Dr. Behneman?

A. I could find out definitely.

Q. I have the records here, suppose we verify it.

Mr. Ferguson: Mr. Jordan, if you say it is June that is satisfactory to us.

Mr. Jordan: I have not the exact date. myself.

Mr. Ferguson: It is immaterial.

Mr. Jordan: I don't think it is particularly material.

(Testimony of Alfred J. Mayman.)

A. If my memory serves me it was about that time.

Q. I am reasonably satisfied it was in June; and do you recall at the time that Dr. Behneman approached the company with the idea of surrendering his old stock certificates and taking voting trust [548] certificates, he was only able to find 940 shares out of his total shares of holdings of record of 1244 shares? Do you remember that? A. Yes.

Q. In other words, he was unable to find a certificate evidencing $304\frac{1}{2}$ shares of his holdings?

A. I think that is the number of shares.

Q. In June or thereabouts, last year, it is true, is it not, that a voting trust certificate was issued to Dr. Behneman for 470 shares, which would be one-half of the 940 shares that he surrendered?

A. I do recall that a voting trust certificate was issued to Dr. Behneman for one-half of the number of shares which he actually surrendered to me, to the secretary, and the issuance of voting trust certificates, or trustees certificates were withheld at that time covering the missing shares.

Q. There was considerable discussion about the issuance of voting trust certificates for the missing shares at that time, was there not?

A. That is right.

Q. The upshot of the entire thing was that the company finally issued to Dr. Behneman a voting trust certificate for $152\frac{1}{4}$ shares of stock upon Dr. Behneman's executing and delivering to the com-

(Testimony of Alfred J. Mayman.)

pany his personal indemnity agreement, under which he guaranteed to save the company harmless in the event that that stock later showed up in the hands of anyone else?

A. That is right. You used the word "voting trust certificates," which I do not think is exactly right. I think they were trustees' receipts.

Q. Trustees' receipts, I think that is the title used.

A. That is right.

Q. In any event, you did issue such a certificate to Dr. Behneman for 152 $\frac{1}{4}$ shares upon his personal indemnity agreement? [549]

A. That is right.

Q. You also recall, do you not, an occasion on December 28, 1940, when Dr. Behneman and I called upon you at the Bank of California, which was on a Saturday morning, for the purpose of presenting Dr. Behneman's trustees' receipts and certificates and taking delivery of the new certificates which would represent a like number of shares, and also take delivery of Dr. Behneman's \$45 per share on his holdings, which totaled 622 $\frac{1}{4}$ shares, that is the first liquidating dividend; do you recall that occasion?

A. I remember your visit very well.

Q. Do you recall at that time you delivered to Dr. Behneman a new stock certificate of the Hendy Realization Company for 470 shares and at the same time you paid to Dr. Behneman \$21,150 on the

(Testimony of Alfred J. Mayman.)

470 shares, as the first liquidating dividend on that number?

A. I did pay him, I don't recall the amount, but \$45 a share on 470 shares.

Q. That was on the certificate which represented the stock that he had and surrendered?

A. That is right.

Q. You recall, do you not, at that particular time, on that occasion you refused to deliver to Dr. Behneman a new certificate in exchange for his voting trust certificate for 152 $\frac{1}{4}$ shares that had been issued on his personal indemnity?

A. I do not like to use the word "refused". I do not think I actually refused, Mr. Jordan. I think the substance of my conversation was that I was prepared to issue a certificate to Dr. Behneman and a check for \$45 a share on that certificate, but I preferred consulting the company's attorney before doing so, as the stock had now a real, tangible value.

Q. In any event, you did not pay Dr. Behneman on that occasion on the number of shares which at that time represented the lost [550] shares?

A. I did not, but if my memory is correct I believe that Dr. Behneman agreed that I could talk it over with the attorneys.

Q. I will agree with that, we did, but I want to ask you if on that occasion, and as a reason—I withdraw that. Didn't you at that time, Mr. Mayman, tell Dr. Behneman and myself that you be-

(Testimony of Alfred J. Mayman.)

lieved that the board of directors of the company would require him to supply a surety company bond as a condition to receiving his new stock certificate for 152 $\frac{1}{4}$ shares, and as a condition to receiving the first liquidating dividend on that? A. Yes.

The Court: How is this material?

Mr. Jordan: In this respect, your Honor, I am leading up to a conversation which I believe will show at least the state of Mr. Mayman's mind at that particular time as to his view on the value of the stock in June, 1940, as compared with December 28.

The Court: How helpful will that be to the court?

Mr. Jordan: Only to this extent, that he as one of the directors the company was unwilling to issue a new stock certificate to cover shares that had been lost, that Dr. Behneman could not have produced and surrendered.

The Court: They did issue them, didn't they?

Mr. Jordan: They did issue on his personal indemnity in December. Your Honor will bear in mind that they issued this voting trust certificate for lost shares in the spring of 1940, or in June, to be exact, on Dr. Behneman's personal indemnity bond, but in December, after the sale and the money had come in they required a corporate surety bond.

The Court: I do not see how that would be material. I do not see how it is going to be helpful to the Court. Here is [551] a long preliminary ex-

(Testimony of Alfred J. Mayman.)

amination for the purpose of asking this witness what the value of the stock is on a certain date. Is that it? My thought is that you ask him that question.

Mr. Jordan: Q. Mr. Mayman, is it not true that on this occasion, on December 28, 1940, that in explaining why the board of directors required a corporate surety bond as a condition of paying Dr. Behneman his dividend on these 150 shares and giving a new certificate of stock, that you stated that the directors' reason for demanding a surety bond at that time in December, 1940, as a prerequisite to the issuance to Dr. Behneman of the new certificate for 152 shares of stock, and of the payment to him at that time of the liquidating dividend payable thereon, was that the stock at that time, in December, 1940, had a definite intrinsic value, whereas it had little or no value in June, 1940, and that the voting trust certificates evidencing the 152 shares was issued to Dr. Behneman upon his personal indemnity bond?

A. No, I have no recollection of such a statement, at all. I do recollect, I think, as I told you a moment ago, that the reason that I gave for the insistence of the surety bond, not the insistence, but I thought that the reason of requiring a surety bond was now that the stock had a very definite, tangible, ascertainable value, and making no comment at all about the previous value of that stock. I do not see how I could have made the statement that you at-

(Testimony of Alfred J. Mayman.)

tribute to me, because at the end of 1939 the stock did have value.

Q. The fact of the matter is that the company did require Dr. Behneman to furnish a corporate surety bond as a condition to paying him the first liquidating dividend and delivering the new certificate, did it not? A. That is right.

Q. Mr. Mayman, the Bank of California was paid the first liquidating [552] dividend, was it not, on the shares which it secured on or about September 20, 1940, from the Estate of Mary McGurn?

A. It was paid the Fresno Land Company, the nominee of the Bank of California.

Mr. Jordan: I think that is all, Mr. Mayman.

Mr. Ferguson: No questions.

Mr. Jordan: Plaintiff Shores and Respondents Shores and Behneman rest, your Honor.

The Court: We will take a short recess.

(After recess:)

Mr. Ferguson: If your Honor please, preliminarily I would like to make some offers. First I would like to offer in evidence a record in the reorganization proceedings under 77B. It is on file here, but I wish to make that offer.

The Court: Very well.

Mr. Ferguson: In that connection, I desire to call the Court's attention to certain specific portions of the record which may be helpful. I might state to the Court in explanation, originally your honor referred this matter to Special Master Judge Beasly. Several hearings were had before Judge Beasly which are fully recorded; the proceedings were had on October 22 and October 28, 1935, at which time Mr. Byrne, of Byrne, Lamson & Jordan, appeared on behalf of Dr. Behneman and objected to the plan. Judge Beasly indicated his view upon the matter, but died before a formal order could be made. Subsequently, Judge Wyman was appointed Special Master, and a further hearing was held before him on the basis of the transcript of the proceedings before Judge Beasly, and additional examination before Judge Wyman. In so far as the argument of the law and of the facts went before Judge Wyman, it was Mr. Byrne's suggestion at [553] that time that that be incorporated in the briefs, and those briefs are on file. I first desire to refer to these portions of the record.

Mr. Jordan: Have you offered the record?

Mr. Ferguson: Yes.

Mr. Jordan: Has it been admitted?

The Court: I will admit it. I do not see any objection to it. It is before the court anyhow.

Mr. Jordan: I do not see that there is any reason to introduce it in the record in this case.

The Court: There may not be. I will admit it anyhow. The record in the reorganization proceed-

ing will be considered part of the evidence in these cases now before me.

Mr. Ferguson: Does your Honor wish it marked as an exhibit?

The Court: No, it is not necessary.

Mr. Ferguson: Referring to the transcript of the proceedings before Judge Beasley now, the first portion of this transcript is as to the value of the stock. The Court will recall that Mr. Jordan was referring to the value of some \$123 a share that the stock had at the time of reorganization. I should like to refer to the actual proceedings and the testimony taken as to the value of the stock. I refer you to pages 24 and 25 of the trustee's testimony, W. R. Bassick, first. There had been preliminarily to this many pages of discussion as to the value.

The Court: Is that a transcript of the evidence?

Mr. Ferguson: This is a transcript of the proceedings. I will read from page 23, if your Honor please.

Mr. Jordan: Your honor, before counsel goes any further, inasmuch as Mr. Bassick, a defendant in this matter, has not been present during this trial, I think we are entitled to know [554] the materiality as to the issues of this case of testimony that was taken in the reorganization proceeding, at the time that the fairness and possibilities of the plan were under consideration.

The Court: The materiality of it is, it is testimony regarding the value of the stock at the time

that the reorganization proceedings were being held before Judge Beasley. It seems to me that is material, Mr. Jordan.

Mr. Jordan: Very well, your Honor.

Mr. Ferguson: This is on cross-examination by Mr. Norton, who was at that time representing Mr. H. L. E. Meyer. This is on page 23.

“Q. Are you acquainted with what the liquidation value would be at the present time of that Sunnyvale property and all the machinery and other items covered by the deed of trust securing the bond issue?”

“The Witness:—“that is Mr. Bassick”—I have not made any figures for liquidating value of the property, but I might say to you that I have had 25 years of experience in manufacturing of every kind; there is a big difference between liquidating value and a going business. As a going business, the inventory and tools, fixtures, are a very important part of the business. In liquidating that don't mean anything except to that particular business. Take a big 16-foot planer, or mill we have there, with a very expensive foundation; that foundation is an asset when it is a going business. When you come to sell that business it is a liability, because it has to be disposed of. It is a detriment to the property. In my judgment there is no market at all for that property except as a going business. The best interests of every-

body would be served by keeping it as a going business.

“Mr. Norton: My idea, my client insisted that the property [555] was worth a half million dollars, which would be quite a bit larger than the amount of bonds outstanding. I was wondering how much less than half a million.”

Interpolating, the Court will recall that the accountant that Mr. Jordan put on the stand testified to a value something in excess of that.

“A. As a going business it is my best judgment it is not worth anywhere near that. As located at present, it would be worth \$100,000.

“Mr. Madison: Q. Turning to Exhibit A, where are the lands covered by the deed of trust and other property? Does that come into the item ‘Sunnyvale Plant’? A. Sunnyvale plant.

“Q. Seventeen thousand is the book value?

A. Yes, the value that was left on the books.

“Q. Now, the buildings—Is that \$102,000?

A. That is \$102,000, yes, nearly \$103,000.”

Now, he testified that the book value was about \$100,000.

On page 18, the same witness, on direct examination, testified:

“Q. Can you say what, in your opinion, in a general way, would be the actual value of these assets with the corporation as a going

concern?
cent.”

A. I should say about 50 per

Now, turning to page 51 of the same transcript, and this is the testimony of Mr. John A. Smiley, and by way of explanation, this is all in the record, at the close of the first hearing, and after Mr. Bassick's testimony with regard to the value of the plant, there was a suggestion that there be some independent testimony with respect to the value of the plant, and Mr. Smiley was engaged for that purpose, and he did testify, and this is the testimony given by him, after testifying to his qualifications, [556] and concerning the fact that he was not an interested party in the employ of the Joshua Hendy Iron Works. This is on page 51:

“Q. Mr. Smiley, I realize, of course, you have had a very few days to examine the plant at Sunnyvale, but have you been able in that time to arrive at some estimate of the value of the Sunnyvale properties or plant of The Joshua Hendy Iron Works?

“A. Yes, I have. In my own estimation, I have formed an opinion about what the property is worth.

“Q. Now, looking at the value of these properties, first, as of their value to the debtor as a going concern. Have you arrived at any value of the property as a going concern?

A. I have.

“Q. Will you state briefly to the court what you find the value to be, in your opinion?

“A. The value on historical basis, less depreciation at the present time, \$295,000.

“Q. In round figures?

“A. In round figures, yes.

“Q. Did you also check that computation by an appraisal of the values of the properties as a going concern on any other basis?

“A. Yes, I took the same figures and worked them up on a reproduction cost basis and depreciated them, and arrived at a figure of \$228,000. That was only to check the reasonableness of my first figures.

“Q. Now, those figures are estimates by you of the value as a going concern of those assets to the debtor, are they? A. Yes.

“Q. Would the same figures represent their value, the value of the assets, if the plant was to be broken up and sold at the present time?

“A. No.

“Q. And have you made any estimates of the break-up value or liquidation value of those assets?

“A. Yes; I arrived at a value of \$92,000. That is the Sunnyvale plant only, not San [557] Francisco.

“Q. We understand. You have prepared a rough recapitulation, showing the items attributed by you to each of the book entry items,

to the buildings, land, and so forth, the check-up of those figures, have you not?

“A. Yes, I have.”

If your Honor please, the Court will find in the reports of Forbes & Company in more detail the basis of arriving at those figures.

Now, turning to pages 46 and 47 of the same volume of the transcript, starting with the words “The Master”—and it may be recalled in this regard that Judge Beasley originally came from Santa Clara County, and was familiar with the conditions in that locality.

“The Master: A fair estimate of the value of that. I do not doubt the estimate of the trustee. I think for this record you should have a fair estimate of the value. I could name somebody, but I do not want to do so, or he will expect a fee. He could go down and take a week or more and charge \$10 a day and the result would be that much more expense. It seems to me somebody ought to have him come here and subject himself to cross-examination so they can convince their clients as to the value of the plant. I doubt if it is of much value. If I were a lawyer facing this matter, I would be very slow to accept the idea that that is worth much down there. That other plant, when it was built, was first class thirty years ago. It has been standing there and they never have been able to dispose of it for any-

thing. These plants, when they are reorganized, or when they are sold in liquidation, they are found to be in the position where some person is interested, and he can force the hand of everybody else and can purchase it." [558]

Now I turn to page 39.

Mr. Jordan: Mr. Ferguson, if I can interrupt just a moment, I have this thought in mind. This testimony is part of the testimony that was taken in connection with this reorganization of the Hendy Company, and it is true the reorganization matter is one of the consolidated matters before your Honor. However, we have another case here, the case of *Shores v. Hendy Realization Company, et al*, which was originally a plenary suit transferred to this court from the Superior Court of the City and County of San Francisco. I think, obviously, this type of testimony, as we are trying that case also, would not be material or admissible in that case. And your Honor also will bear in mind that we have a motion to dismiss the reorganization petition upon the ground that the Court has no jurisdiction over the subject-matter, and that has never been ruled upon. And I would like to ask that the record show an objection on our part as to the materiality of all of this type of testimony in so far as the case of *Shores v. Hendy Realization Company, et al* is considered.

The Court: Your objection comes a little late, it seems to me.

Mr. Jordan: Then I will object from this point on.

The Court: It may not be material. I do not know whether it is material or not. I mean in the case that you mentioned it may not be material, at all, in the Shores case. Are you objecting?

Mr. Jordan: I object, if your Honor please, to any further testimony along this line in so far as the case of Shores v. *Henderson* Realization Company, et al is concerned.

The Court: Overruled.

Mr. Ferguson: Now, on page 39, there is a discussion, and then the master speaks, and in this connection this controversy [559] is had with Mr. Byrne, of the same firm of attorneys representing Dr. Behneman, one of the two defendants in the petition, who urged that the stockholders could not be required to give away 50 per cent. of their stock.

“The Master: It is conceded here that this corporation is insolvent.

“Mr. Pedder: Absolutely insolvent.

“The Master: Everybody present concedes the insolvency?

“Mr. Pedder: Absolutely busted.

“Mr. Byrne: I think it is busted.”

Now, turning to the Master's Report to your Honor, which is Judge Wyman's report, page 5——

Mr. Jordan: It will be understood that my objection will run to this entire line of testimony as

far as *Shores v. Hendy Realization Company, et al* is concerned, your Honor?

The Court: Yes.

Mr. Ferguson: The Master's Report shows under this heading, "Admissions as to insolvency of the debtor"—In other words the contention, the Court may recall, was to the effect that since the debtor was hopelessly insolvent the stockholders should be made to give up 50 per cent.

"Admissions as to insolvency of Debtor. It also will be noted that there appears in the record, page 39 of proceedings of October 22, 1935 the following admissions: 'The Master: It is conceded here that the corporation is insolvent?'

" 'Mr. Pedder: Absolutely insolvent.

" 'The Master: Everybody present concedes the insolvency?'

" 'Mr. Pedder: Absolutely busted.

" 'Mr. Byrne: I think it is busted.'"

Then turning to page 7: [560]

"The question of fact, it properly may be said, is self-determined. In other words, since it has been conceded by all that the corporation is insolvent, that element of the case is settled. Under the circumstances it appears that the Court is bound to proceed upon the theory that at this stage of the proceedings the stock is utterly worthless."

Then the Court considers it at some length, and I will point out that in paragraph 16 of the Order confirming the plan and the Report, the Court followed the thought of the Special Master.

Now, before I pass from the record, although I may later come back, it may be helpful at this time to also point out that there was discussion during the time that the plan was under consideration as to whether or not there were any considerations such as now urged by Mr. Jordan upon the right of the directors to distribute the stock upon rehabilitation, in that the attorneys took the absolutely opposite position.

Returning again to Volume 1, page 31, Mr. Byrne had made a rather long statement, I won't read all of it, relating to the constitutional objections, but in summarizing his objection to confirming the plan he said:

“Furthermore, they say to give it to the board of directors to give away as they please for the successful rehabilitation of the company's affairs. All right, what does that mean? I asked Mr. Pedder, who is attorney here, I said, ‘Does that mean when it is on a dividend-paying basis? Does that mean when the debts are paid? Is that a condition?’ He said, ‘Oh, no, that is to give it away at any stage that they want to.’ We say that there is no consideration for such a plan, that it is not within the meaning of 77B, and if it were it would be tak-

ing [561] away one's property without due process at law. There is no consideration, whatever, given for it."

Mr. Byrne: Just a moment. There was no such understanding there and I do not think the wording of the transcript bears out any such statement. If you will look through that you will find I objected to it, that it was indefinite as to what it meant.

Mr. Ferguson: I will submit this language, and from the language it is our contention that it shows it was Mr. Byrne's objection to the plan that this language constituted no bar to the discretion of the board of directors and it could be distributed at any time, and it is now claimed that it cannot be distributed as a reward for successful management and rehabilitation.

The Court: Mr. Ferguson, why argue the matter now?

Mr. Ferguson: On page 37 Mr. Byrne again said:

"You do not modify the right of stockholders by taking out of their pockets and putting into the pockets of anybody else. Furthermore, there is no condition upon which these people are to get this stock, at what stage of the game."

That was his contention of what the plan meant at that time.

Now, incidentally, on the same page it might be of interest to note the master's comment, in the third paragraph from the bottom:

"The Master: Why cannot the Court approve"—Just before that the Master had said:

"The Master: In a matter of this kind, has the Bankruptcy Court authority in response to a plan of this kind that is consented to by a sufficient number of stockholders, to wipe out some of the stock? I am speaking of common stock certificates. [562] We have the right to do that.

"Mr. Byrne: To make them surrender?

"The Master: Yes, cancel it.

"Mr. Byrne: I am rather inclined to think it could be cancelled.

"The Master: Why cannot the Court approve the use of it for the purpose of securing a competent management and paying the managers, instead of the money, paying them by delivering stock to them?"

That, by way of interpolation, we contend was done in this case.

There was no extended oral argument before Judge Wyman when it was submitted to him, but by reason of the fact that the statements of counsel were in their briefs, I desire to refer to that portion of it which expresses their contention. This is the brief of Byrne, Lamson & Jordan, filed

January 6, 1930, starting on page 5, line 15.

Mr. Jordan: If your Honor please, I am going to object to Mr. Ferguson reading a brief that was filed some five years ago in a matter that involved an entirely different issue, namely, a dispute on a plan of reorganization. If he wants to argue that in this case later on that is his privilege, but to read argument in a brief filed at such a long period of time, it seems to me is not evidence in this case, and should not be permitted in the record as such.

Mr. Ferguson: May I be heard?

The Court: Overruled.

Mr. Ferguson: Starting at line 15, page 5:

“Mr. Byrne: Here we have a plan to take away 50 per cent. of the shares of Harold M. F. Behneman and to give it to the [563] board of directors, which it is obvious will be entirely controlled by the Bank of California, a secured creditor.”

The Court: You are not contending that these are admissions by a party. They are simply to show the attitude of the attorneys at that time.

Mr. Ferguson: To show what they thought of the plan when it was under consideration and adopted, and I think in arriving at the intention, that is important. In the same case a brief was filed, and these briefs took the place of oral argument. A brief was filed by the secured creditors,

in which it was stated, "The conclusive fact is that the corporation is admitted insolvent and the stockholders no longer have any equity in the assets of the corporation.

Mr. Jordan: I am going to make the same objection at this time to the reading of that brief as well, on the same grounds.

The Court: Overruled. I will allow the reading of it. It is in the nature of argument, there is not any doubt about it, that is understood. There is no admission on the part of the attorneys that I can see, from anything that has been read so far. It simply shows what the attitude was during that trial. Of course, you have a right to change that, I suppose.

Mr. Ferguson: I will now refer to the report of Judge Wyman.

Mr. Jordan: Is that the last report, Mr. Ferguson?

Mr. Ferguson: This is the report on the plan dated February 19, 1936. It says on page 9:

"Bluntly put, the proposition to the stockholders is this, you have nothing now except some worthless stock."

I should like to also offer, if your Honor please, the minutes of the meeting of the board of directors and stockholders—I think there is danger in having only isolated portions read [564] as has been done. The meeting of the board of directors

with respect to the granting of the option has been read, but it has not been pointed out, although there is in evidence a copy of the stockholders meeting, pointing out that before the voting trustees permitted or authorized the sale of all of the Sunnyvale assets a letter of intention was directed to all of the old stockholders and no objection was made.

Mr. Jordan: What kind of a letter?

Mr. Ferguson: It is set forth in the minutes in haec verba. It is in evidence. I think there is danger unless the full minutes are read. We are very anxious to have the court know exactly what was done, and it is upon that basis that we feel, and only upon that basis can a fair determination be made.

Mr. Jordan: To which we object on the ground that they are obviously self-serving, and we would have no opportunity of cross-examination. Furthermore, they are entirely self-serving. They do not go to prove the facts stated there. We are entitled to cross-examine, and you can put somebody on.

Mr. Ferguson: I will withdraw them and prove them by competent evidence.

Mr. Jordan: You would not expect us to accept as true everything that was recited in the minutes.

Mr. Ferguson: No. I would expect you to agree that these were the minutes, and there is a prima facie presumption that the minutes correctly set forth the proceedings of the board of directors.

Mr. Jordan: I know, but the presumption does not go to the extent that everything stated in those minutes, is true.

The Court: You want to introduce all of the minutes, as I understand? [565]

Mr. Ferguson: That is correct.

The Court: You do not want to encumber the record with all of the minutes, do you?

Mr. Ferguson: No, I will make my offer in the regular way. Mr. Levit, will you take the stand?

MORRIS LEVIT,

recalled for the Defendants and Petitioners.

Mr. Ferguson: Q. You have already been sworn, Mr. Levit? A. That is right.

Q. Mr. Levit, in your examination by Mr. Jordan you referred to conversations, very generally to the fact that you had had some conversations with Mr. Moores and Mr. Bassick and others, with respect to your compensation. I do not believe you went into that very fully. Can you tell us how many conversations you had with Mr. Moores, or Mr. Bassick?

A. Well, I would say that I probably discussed the matter with Mr. Bassick twenty times.

Q. Over what period of time?

A. Well, from the time that the reorganization

(Testimony of Morris Levit.)

plan was first put into effect up to the time of the sale.

Q. Where were those conversations held?

A. In our office in San Francisco.

Q. Was anybody else present, do you recall?

A. I think Mr. Hyland was present at some of the conversations.

Q. What were those conversations?

Mr. Jordan: Just a moment, now, I think in the first place the time and place of the conversations should be stated, and in the second place I think any conversation of that sort would be entirely self-serving. We were not present, and we certainly [566] would not be bound.

Mr. Ferguson: If your Honor please, one of the allegations of our petition was denied, and therefore put in issue the fact that these officers agreed to work at substantially less than the compensation they had been receiving, and the reason for their so agreeing was that they were promised additional bonuses in cash and in stock for so working. I think it is very material to determine whether or not during the five years they performed services it was in reliance upon the fact that they would be given bonuses and stock.

The Court: I think the first part of Mr. Jordan's objection is good, that is to say, as to the identification of the time and place.

Mr. Ferguson: I will try to do that, too.

(Testimony of Morris Levit.)

The Court: All right, the objection is overruled.

Mr. Ferguson: Q. Can you tell us when the first conversation was held?

A. My first conversation in regard to compensation with Mr. Bassick was almost immediately after he came in as a receiver, which I think was in 1934; he called me into his office and told me that he was extremely anxious that I should stay on and assist them particularly in the same position that I held for so many years before, and I told him that I was not at all sure that I wished to do that, for the reason that I had accepted two reductions in salary during Mr. Behneman's receivership, and I felt that my salary should be reinstated to what it was originally. He said if I felt that way about it he just felt he could not go on, that he wanted me to stay there, he wanted me with him, and he also said if we were going to make a success of the business there would probably be still further cuts in salary, but he assured me if I would consent to any further cut, [567] just as soon as the business got to be a going concern and we were again solvent, that he would personally see to it that I was compensated in an amount sufficient to take care of all of the cuts I had taken, all of the reductions in salary, and I voluntarily consented then to let him cut my salary another hundred dollars a month. I do not remember the month he came in, but I think it was in April of 1934.

Q. It was in March, 1934.

A. In March.

(Testimony of Morris Levit.)

Q. You say you had other conversations with him. Can you remember when the next one was?

A. Probably a year after that.

Q. That would make it in March or April, 1935?

A. I would think so, yes.

Q. Where was that conversation held?

A. I asked him if he could see his way clear to——

Q. Where was this conversation?

A. All of these conversations were held in our San Francisco office, mostly in Mr. Bassick's office.

Q. Was anybody else present at this conversation? A. Not that I know of.

Q. State the conversation, please.

A. I called his attention to our previous meeting in regard to my salary, and he stated that matters had not progressed so that anything could be done, and I more or less agreed with that, too. That was prior to the reorganization.

Q. Now, did you have any other conversations prior to that?

A. Well, immediately after the reorganization I discussed the matter with him again.

Mr. Jordan: Just a moment, as far as any conversation after the reorganization—I presume that would be a time that Mr. Bassick became president of the company, and after the company [568] came out of the 77B proceedings, is that correct, Mr. Ferguson?

(Testimony of Morris Levit.)

Mr. Ferguson: I do not imagine it would be, because he continued to be trustee for some number of months afterward, and if it was immediately after the plan was confirmed he probably still was trustee.

Mr. Jordan: If this conversation took place before January 27, 1937 then I have no objection.

A. This was in 1936, I should say, it was immediately after the reorganization plan was approved by the Court. I went to Mr. Bassick and spoke to him about what my participation would be in the stock distribution, that is, that portion of the stock which was to be reserved for the main employees, and he told me that it would be very substantial whenever the time came that the company was again solvent and the stock was distributed. After that time I talked to him repeatedly about it, and particularly after the middle of the year 1939, I told him that I was convinced that the company was solvent at that time.

Mr. Jordan: Just a minute now, that is coming to a conversation regarding which no foundation has yet been laid, and I am going to object to anything Mr. Bassick may have said after he became president of this company, and it was out of the 77B proceeding, upon the ground that no foundation has been laid to show that Mr. Bassick had any authority to make any representation of this kind on behalf of the corporation.

The Court: That was after reorganization?

Mr. Jordan: After the company had come out

(Testimony of Morris Levit.)

of reorganization on January 27, 1937, when your Honor entered the final decree.

The Court: It was still operating under the plan, was it not?

Mr. Ferguson: That is correct. [569]

The Court: Overruled.

Mr. Ferguson: May we have that conversation which you say was in the middle of 1939?

A. About the middle part of 1939 I told Mr. Bassick that I felt the company was now solvent, and I thought a stock distribution should be made at that time, at least a partial stock distribution, and he told me that he would consult with the board of directors, discuss the matter with them fully, and see what could be done. I had repeated conversations with him after that up to the time of this sale. I was continually assured that the distribution would be made just as soon as they could do it, or just as soon as the directors felt that it was the proper time to do it. I also had a conversation with Mr. Moores, who was vice-president of the company.

Q. Before we get to Mr. Moores, might I also ask in connection with any of your conversations with Mr. Bassick did you have any conversation regarding cash bonuses?

A. Yes, I had a conversation regarding cash bonuses.

Q. Can you fix the time?

A. As soon as Mr. Bassick got there, which was

(Testimony of Morris Levit.)

in 1934, and probably once or twice after that, before the reorganization. Then during the reorganization I received a cash bonus almost every year. It was always known that I was to be compensated at the end of the year with further consideration than my salary.

Q. Now, you say that you discussed this matter with Mr. Moores. Did you discuss it with him once, or more than once?

A. I discussed it with him at least half a dozen times.

Q. Can you tell us when the first time was?

A. The first time I discussed the matter with Mr. Moores was immediately after the reorganization plan went into effect.

Q. That would be sometime in 1936?

A. That is right. [570]

Q. Where was that conversation held?

A. I think that was held in our office.

Q. Who was present, if you recall?

A. I could not recall who was present.

Q. What was the conversation?

A. I asked him to explain the proposed stock distribution, and he gave me about the same explanation that Mr. Bassick did.

Mr. Jordan: Just a moment, if your Honor please, I think we should have the witness' recollection of the conversation that took place, and at this time I am going to renew my objection that no

(Testimony of Morris Levit.)

proper foundation has been laid to show Mr. Moores had any authority to make any representation.

The Court: Overruled.

Mr. Ferguson: Q. Be as specific as you can, Mr. Levit.

A. It seems to me I met Mr. Moores in the entrance room of our office; he came in to see Mr. Bassick, who was busy, and we had a discussion right out there, and he assured me that when the proper time came the stock would be distributed and that I would receive a substantial amount of it. Then after the middle of 1939 I had several conversations with him in regard to it.

Q. Let us see if we can fix the time a little closer.

A. I could not tell you definitely. I know I talked to him half a dozen times about it, but I would not want to say what month it was, or where it was. I talked to him several times in the bank, I talked to him on the streets when I would meet him, call his attention to the fact that I thought the stock should be distributed, and he more or less agreed with it, but said they were not quite ready at that time to do it, it would be done later on. [571]

Q. Anything said about who would get it when it was distributed?

A. No, he did not. He told me I would receive a substantial amount of it, but I did not know who else was going to get it.

(Testimony of Morris Levit.)

Q. In any of your conversations with Mr. Moores did you mention the subject of cash distribution as well as stock distribution?

A. I remember going over to Mr. Moores and telling him I had received a cash distribution, and used to tell him I appreciated it very much, also that I hoped it would continue.

Mr. Ferguson: That is all.

Cross Examination

Mr. Jordan: Q. I think that the first conversation of the twenty or thereabouts conversations that you had with Mr. Bassick on the subject of your compensation, Mr. Levit, took place in 1934; that was when Mr. Bassick was receiver.

A. Yes, early in 1934.

Q. And then at that time he told you he wanted you to stay and he assured you that as soon as the business become a going concern—I think those were your words—that you would be entitled to and would receive additional compensation.

A. That is right.

Q. That being in 1934, that was before the company had become involved in the corporate reorganization proceeding?

A. That was during the receivership, Mr. Jordan.

Q. During the receivership, the State receivership?

A. That is right.

Q. So that the compensation that was promised

(Testimony of Morris Levit.)

you at that time was in the nature of cash, was it not? A. That is right.

Q. That was the sole thing that your discussion had reference to? A. That is right.

Q. There was no talk at that time that you would ever receive [572] any stock under the circumstances that you did ultimately receive it?

A. That is right; the matter of stock did not come up until the development of the reorganization plan.

Q. So that the meeting you had with him in 1935, in March or April, during which a similar conversation took place, only dealt with the subject of additional monetary compensation?

A. That was in March or April of which year?

Q. 1935. A. That is right.

Q. And then the next time you met or talked to him about this, as I understand it, was in 1936—no,—I believe we went over to 1939. A. Yes.

Mr. Ferguson: No, he testified immediately following the plan in 1936.

Mr. Jordan: As far as your 1939 conversation was concerned, you told Mr. Bassick that you wanted some of these 2212½ shares of stock held by the trustees? A. Yes.

Q. And Mr. Bassick represented to you that you would get that stock as soon as the proper time came—I believe those were your words as I wrote them down—as soon as the proper time arrived for the board to distribute them.

(Testimony of Morris Levit.)

A. Something to that effect, yes; he said he would take it up with the board of directors.

Q. Did he tell you, in making that statement, elaborate on what he considered to be the proper time? A. No.

Q. Or what the board considered to be the proper time? A. No, he did not.

Q. You had a talk also with Mr. Moores shortly after the plan went into effect at the office?

A. Yes.

Q. And Mr. Moores, according to your testimony, also assured you that at the proper time you would have some of this stock [573] in a proper or substantial amount?

A. In a substantial amount.

Q. Did Mr. Moores tell you at that time what he considered, or what the board of directors considered would be a proper time?

A. No, that was not discussed with him.

Q. In 1939 you had another talk with Mr. Moores and at that time he told you upon your inquiry about the stock that the board was not quite ready?

A. He said they were not ready to make the distribution at that time.

Q. Did he say when they would be ready?

A. He did not mention any definite time, he said it would be done just as soon as they thought it could be done, but he did not say when it would be.

(Testimony of Morris Levit.)

Q. He did not tell you under what circumstances the board would consider it proper for it to distribute the stock? A. No, he never told me.

Q. Now, you told us about all the conversations that you had on the subject of distribution of the stock to yourself?

A. Well, I have only told you about the conversation that I had with the other members of the company, but the matter was discussed with other persons that are members of the organization.

Q. My question was not properly termed. What I had in mind was you have told all of the conversation that you had with any officers or directors of the company with respect to issuing stock to you?

A. In so far as I can remember. I know I had very frequent conversations with regard to it.

Q. Those conversations, to the best of your recollection, all took place in the company's office?

A. No. The conversations with Mr. Bassick took place in the office of the company.

Q. And Mr. Moores?

A. Once or twice with Mr. Moores in the [574] company's office, several times in his office in the Bank of California, and I think on one occasion I met him on the street and discussed it with him.

Q. But those meetings were casual meetings, in the sense that you meet and discuss this subject, is that correct?

(Testimony of Morris Levit.)

A. No. I went particularly to see him on *almost* of these occasions to discuss the matter with him.

Q. Let me ask you this: Did you ever appear before the board of directors of the Hendy Company at a formal board meeting, for the purpose of discussing with the board a distribution to you of any of the stock?

A. No, I did not. I was entirely willing to leave it to Mr. Bassick and Mr. Moores.

Mr. Jordan: That is all.

The Court: We will continue the trial until tomorrow morning at 10:00 o'clock.

(An adjournment was here taken until tomorrow, Thursday, September 25, 1941.) [575]

Thursday, September 25, 1941—10:00 o'clock A. M.

The Court: You may proceed in *Shores v. Hendy Realization Company*.

Mr. Ferguson: Yes, your Honor. Mr. Hyland, will you take the stand?

E. M. HYLAND,

recalled for Defendants and Petitioners.

Mr. Ferguson: Q. Mr. Hyland, you have been sworn before? A. Yes.

Q. In your examination by Mr. Jordan you referred briefly to the fact that you had had various

(Testimony of Elmer M. Hyland.)

conversations with Mr. Moores and Mr. Bassick regarding your compensation as an employee of the company, and as an officer. Will you tell us when the first of those conversations was had, and with whom?

A. The first conversation was with Mr. Bassick at the Sunnyvale plant in the early part of 1936, prior to the reorganization plan, at which time he discussed with me various phases of the plan, and said that the work would include certain stock considerations for the managing directors of the company. Then later, I would say in December of 1936, we again discussed the matter, and I wanted to know whether or not I was to be included in that, and he assured me that I was to be included as one of those who received the stock. In 1937 I again discussed the matter with Mr. Bassick, in a general way, and he again told me that the stock ultimately would go to the employees, which included myself.

In the early part of 1938 I went to Mr. Bassick and told him I had been offered another position in the East Bay District to manage a plant, and the salary at that time was to be greatly [576] increased over what I was getting from the firm, and asked him his advice, and he assured me that, he advised me to stay with the company, because he thought that things would look up, and the prospects at the plant were good, and said that if I would stay with the company he was sure I would

(Testimony of Elmer M. Hyland.)

be well taken care of, and would not lose anything. And that same year, about December——

Q. Was that 1937?

A. 1938. In December of 1938 I was in Denver on firm business, and was again approached by another company that was doing business in Denver, a large manufacturing company, and they wanted to open up a branch on the coast, particularly in San Francisco or the East Bay, and the president of the company at that time offered me a real interest in the new company, as well as a substantial salary.

Q. When you say a substantial salary, you mean an excess in the salary you were getting here?

A. Yes. In fact, he offered me \$12,000 a year, and I was quite impressed with that offer, and I left the impression that I would accept it, although I said I wanted time to think it over, and I then talked it over with Mr. Bassick, and he again assured me that he had been in conference with the various members of the board of directors, and they all felt that we were making real progress, and that I would not lose anything by staying with the company, and that I was needed in that position of running the plant. I took the matter under advisement, and then went to see Mr. Moores, at the Bank of California, and he also——

Mr. Jordan: Pardon my interruption, but when was this? A. About December, 1938.

Q. The end of December, 1938?

(Testimony of Elmer M. Hyland.)

A. Yes, I asked Mr. Moores' advice [577] then, of the Bank of California, and he spoke very encouragingly of the prospects of the company, and while he did not ask me to stay he felt that I would not be losing money by remaining with the company.

The Court: Q. You had been with The Joshua Hendy Company how long?

A. I had been with the company thirty-three years. I started just after I got out of college, and I went through the various phases of the plant, as a machinist, and in the foundry, and through the various positions. In 1939 and 1940 I had various conversations with Mr. Bassick, because, frankly, I wanted to have the assurance and bring it more or less up to date, that I was going to be properly compensated, because I was working, and working hard, at a very low salary, and I did not want to go on without that assurance, and I kept bringing this matter up numerous times. In fact, Mr. Bassick wrote me letters confirming our conversations, that I would be properly taken care of, and I kept those letters, and in fact last night I looked for them, and I have filed them so carefully that I could not even find them myself. I still think I can locate them on further search.

Mr. Ferguson: Q. You mentioned that in the first one or two conversations the distribution of stock was mentioned. In the subsequent conversations was stock mentioned?

A. Yes, stock was always the main considera-

(Testimony of Elmer M. Hyland.)

tion; there was no direct promise of any cash, but the inference was that we would receive the stock as the equivalent, so that the salary would be properly adjusted.

Q. Now, you referred to a conversation with Mr. Moores in December, 1938, about distributing stock. Did you have any conversation with Mr. Moores prior to December, 1938?

A. Yes. I believe my first conversation with Mr. Moores was in the latter part of [578] 1936. I had been approached by a member of the Hendy family to purchase some stock, and I went to Mr. Moores to ask him his opinion as to the value of that stock, and he told me that as of that date it had no value, and he advised against paying anything for it, and as a result I did not purchase the stock.

The Court: Q. When was that?

A. That was in the latter part of 1936, several months after the reorganization. I also approached Mr. Moores in the early part of 1938, when I had the East Bay offer, and he then mentioned that the stock would be distributed and I would receive my share at the proper time. He never at any time committed himself as to the quantity, or when the stock would be distributed. I also talked with Mr. Moores on more than one occasion in 1939 and 1940, I do not remember the date, frankly, but I was never discouraged from the fact that I would receive my stock, and he expressed himself on one occasion that the members of the board of directors were jointly

(Testimony of Elmer M. Hyland.)

in favor of the progress that had been made, and that I would be properly rewarded. In 1939 Mr. Price, also a member of the board of directors, called at the plant and looked over the work in progress, and expressed himself as being highly pleased with the progress that had been made.

Mr. Ferguson: Q. Do you recall any other conversations to which you did not testify?

A. No, I think that that covers the principal conversations.

Q. Now, you mentioned last night searching for some correspondence that you had with Mr. Bas-sick. As a matter of fact, I asked you prior to that to see if there was some corporate correspondence?

A. Yes, and I again looked last night.

Q. At that time you found one of the letters, although you told [579] me there was more than one—but there was one you could find?

A. That is right.

Mr. Jordan: Are you going to offer the letter?

Mr. Ferguson: As soon as he identifies it.

Q. I hand you a document dated October 13, 1937, and ask you if that is one of the letters that you did find. A. Yes, it is.

Q. That was received by you on or about the date it bears date? A. Yes.

Mr. Ferguson: If your Honor please, I now offer this letter in evidence as Petitioner's Exhibit next in order.

Mr. Jordan: I will object to the introduction of

(Testimony of Elmer M. Hyland.)

this letter in evidence upon the ground that it is self-serving and hearsay; we have no opportunity to examine Mr. Bassick; and upon the further ground that there has been no foundation laid to show that Mr. Bassick, presumably writing this letter as president of the company in October, 1937, had any authority from the board of directors to make any commitment or promise to Mr. Hyland.

The Court: It has been testified to the effect that this matter was discussed before the directors. When I say "this matter," I am not referring particularly to any compensation to this witness, but to the distribution of stock to employees, etc. Let me see the letter.

Mr. Jordan: There has been, I believe, testimony that there was this discussion between various directors, but I do not believe there is any testimony of a formal discussion.

The Court: What is your reply to the objection, Mr. Ferguson?

Mr. Ferguson: My reply is this, if your Honor please, that Mr. Bassick, who was president of the corporation, had authority, [580] and I think that was within the implied powers of the president to discuss the matter, and there has been testimony, as the Court pointed out, that the board of directors informally discussed this matter.

The Court: What is the date of that?

Mr. Ferguson: October 13, 1937. If your Honor please, it is alleged in the petition that under the

(Testimony of Elmer M. Hyland.)

plan of March 24, 1936, this stock was to be distributed to the managing officers.

The Court: The plan, itself, provides that the stock shall be distributed by the board to the managing officers as a reward for successful rehabilitation of the company's affairs. The objection is overruled.

Mr. Ferguson: If your Honor please, in view of the fact that the court looked at the letter, may it be deemed read?

The Court: Yes.

(The letter was marked "Respondents' Exhibit A.")

Mr. Ferguson: Q. Now, Mr. Hyland, also in Mr. Jordan's examination you referred to the fact that you had been a great many years with the plant and during the period involved subsequent to reorganization were plant superintendent, also bore the title "Vice-president in charge of manufacture." Can you tell us whether the condition of the plant at the time that the plan of reorganization went into effect was the same as the condition of the plant at the time that the plant was sold?

Mr. Jordan: I think that question is too indefinite, and that it probably calls for the opinion and conclusion of this witness.

The Court: He is qualified to testify. He surely must know something about it.

Mr. Jordan: I have no doubt about that, but I am merely point- [581] ing out to your Honor that the

(Testimony of Elmer M. Hyland.)

word "condition", I do not know exactly what that means.

The Court: You mean physical condition?

Mr. Ferguson: The physical condition.

The Court: Very well.

Mr. Ferguson: I will amend the question and will say, "physical condition."

A. The plant as of 1934, when Mr. Bassick took charge,——

Mr. Jordan: Just a moment, I think the question was in 1936, at the time of the plan of reorganization.

A. That is true.

The Court: This is preliminary, I suppose?

A. That was just preliminary, in 1934. May I answer it that way?

Q. Yes, go ahead.

A. In 1934 the plant was in a deplorable condition. In fact, when Mr. Bassick took charge there was not a man working on any profitable job in the organization. It was simply flat. That was the condition when he came to the plant for the first time, all of the tools, when I say "all of the tools," I should say practically all of the tools were so run down that they were not capable of producing any work with sufficiently close tolerances to meet the customers' requirements. From 1934 until 1936 some progress was made toward rebuilding those tools and fixing them up, but there was very little money available, therefore not much progress was

(Testimony of Elmer M. Hyland.)

made. When the reorganization plan became effective in 1936 we really started in then to overhaul the plant and tools, as well as the building, and I think I can safely say that 90 per cent. of the machine tools in that plant were overhauled and the expense charged as an operating expense of the plant, and also the buildings were [582] in such shape that they were really unsafe for the overhead electrical cranes to travel in the building, and necessitated reinforcing the building as well as the foundation, all of which expense was absorbed as operating expense of the plant.

Mr. Ferguson: Q. Notwithstanding that a substantial part of it, as you have indicated, was restored as an operating expense, it would not increase the capital stock assets, I mean things that were actually capitalized, I mean some major items of machinery that were added?

A. That is true.

Q. Will you describe those, briefly?

A. Well, referring particularly to the tools that were charged to capital assets?

Q. Yes, I believe the books will reflect that some improvements to which you referred were capitalized, although the bulk of it was not.

A. Well, I do not think I am in a position to say just what tools were charged to capital assets, because I did not have anything to do with the bookkeeping, but I do know that I passed on the expense, both of labor and material of rebuilding

(Testimony of Elmer M. Hyland.)

and repairing, and I know they were charged to operating expense of the plant.

The Court: Were any new tools furnished?

A. Yes, we purchased three machine tools, one for a screw machine, a 7-foot drill press, and a very large vertical boring mill; it was a very expensive tool, and was necessary to secure other work that we had in prospect.

Mr. Ferguson: Q. Do you know what the cost of those, the drill press and the screw machine, etc., was, have you any idea?

A. I have an idea, but I am afraid it would be so approximate——

Q. Your theory is that the books would be better evidence in that respect?

A. I would rather leave it to the books.

Q. One further question: Do I understand, then, from your tes- [583] timony, that the physical condition of the plant at the time of the sale in 1940 was substantially improved from that which existed at the time the plan was confirmed in 1936?

A. Yes. I intended to cover that by my explanation.

Q. I think you did. That is all.

The Court: Did I understand you to say you were the manager of the plant?

A. Yes, I was considered as plant manager and vice-president, of manufacture.

Q. As plant manager, were you at the plant all the time?

(Testimony of Elmer M. Hyland.)

A. All the time with the exception of occasional trips where mechanical knowledge was needed.

Cross Examination

Mr. Jordan: Q. Mr. Hyland, I think that the first conversations that you testified to with Mr. Bassick, regarding your compensation, took place at the Sunnyvale plant sometime early in 1936, or before the confirmation of the plan of reorganization on March 24, 1936.

A. I do not think that I referred particularly to any compensation early in 1936. I believe that what I intended to convey was that Mr. Bassick explained to me then that the plan was then being started for the reorganization, and it provided for a stock distribution. Perhaps I did not make myself perfectly clear on that point.

Q. That was the contemplated stock plan that was to be incorporated in the plan of reorganization if it was confirmed by the court?

A. That is right.

Q. Now, just so we will have the continuity of this matter, you went back to 1934 and described the condition of the plant at that time, and of course you had been with the company for many years up to that point. What was your salary per month in 1934?

A. I think I previously testified that I was not [584] positively sure, but when I went in, when Mr. Bassick came in in 1934, approximately April, I agreed to take a salary equivalent to what I was

(Testimony of Elmer M. Hyland.)

getting as assistant plant manager before that time, working part time; in other words, I had previously, on account of the condition of the plant, only been working part time, for which I received approximately \$250 a month, and I agreed to continue on as manager of the plant *as* the same rate that I had been getting just prior to that date.

Q. Between 1934 and 1936, did you receive increases in salary over the \$250?

A. My memory is not very clear on that, except my impression that I did receive some very small increase, but I don't remember just what that was.

Q. Now, will you tell us the maximum salary that you ever had received from The Joshua Hendy Iron Works prior to March 24, 1936?

A. I can tell you only so far as I have received monthly, and that was \$350, plus additional bonuses that I frankly have no knowledge now of, just how much they amounted to.

Q. Could you make an approximation of what they amounted to, the average of the entire five years' period, a month?

A. I would rather average that, but this is only a guess, you understand—I would think they would average an increase of about \$1000 or \$1200 a year.

Q. So that would have been your top salary prior to March, 1936, an average inclusive of bonuses and salary of between \$400 and \$450 a month?

A. I would think that, yes.

Q. That, of course, was not continuously prior

(Testimony of Elmer M. Hyland.)

to March, 1936, by any means, because you testified in 1934 you were receiving \$250.

A. That is right, but you understand that prior to 1934 I was not plant manager, I held lower positions.

Q. I also understand that you had never been employed by any other [585] company during your work life, practically, than The Joshua Hendy Iron Works? A. That is right.

Q. Now, in December, 1936, you again discussed this matter of compensation with Mr. Bassick, and Mr. Bassick said that you would be included among those who would receive stock? A. Yes.

Q. And that was after the plan had been confirmed, of course, by some months? A. Yes.

Q. Now, at that time did he tell you when you could expect to receive that stock, or make any definite commitment, or was it merely an assurance in effect that at some future time if the stock was distributed you would be taken care of?

A. That was the extent of the promise.

Q. But as I understood your testimony there was a definite assurance around the end of December, 1936, that at a future date the stock would be distributed?

A. I would hardly like to go as strong as that. I think as early as 1936 the promise was that if and when the stock was distributed then that I would receive my just share; I do not think it was ever definitely promised earlier than that.

(Testimony of Elmer M. Hyland.)

Q. At that time, when that representation was made to you in December, 1936, when you were told that if and when the stock was distributed that you would get in on it as one of those who would be entitled to distribution, did Mr. Bassick tell you what condition the company would have to reach financially before the board would be disposed to distribute that stock?

A. I do not think that angle was discussed. I do not think he mentioned that.

Q. In other words, then, as I understand it, Mr. Bassick did not relate to you any circumstances or conditions which would have to occur as a prerequisite to your receiving a portion of [586] this trustee's stock? A. I think that is correct.

Q. You said that in December, 1936, there was only this when and if promise, and you said at some later point there was a definite promise, assurance that the stock would be distributed. Do you now recall the approximate date when that positive assurance was made to you that you would receive some stock?

A. Well, the positive assurance came in 1939 and 1940, but as early as December, 1938 Mr. Bassick expressed himself as very favorably inclined to believe that there would be a distribution.

Q. He expressed himself as favorably inclined, but that was still not a positive assurance?

A. I do not think that there was any positive assurance in 1938.

(Testimony of Elmer M. Hyland.)

Q. Now, in 1939 or 1940 who made you the positive representation that you would receive a portion of that stock?

A. Both Mr. Bassick and Mr. Moores.

Q. Now, with reference to 1939, will you state the circumstances under which, during that year, either Mr. Bassick or Mr. Moores positively told you that you would receive stock?

A. In answer to my direct inquiry, when I took the matter up with Mr. Bassick at the plant on several occasions, and I would not want to point just to the particular month or just the occasion, it happened so often, that the matter was taken up.

Q. This was in 1939?

A. In 1939 and 1940, both.

Q. As I understand, then, you were positively assured by Mr. Bassick on several occasions, both in 1939 and 1940, that you would receive the stock?

A. Yes.

Q. Or at least some portion of it?

A. Yes, receive some portion of it.

Q. Did he ever at the same time tell you when you could expect to receive that stock?

A. No, he did not. [587]

Q. Did he ever, at any one of those occasions, ever tell you what conditions would have to be accomplished or what financial condition the company would have to be in before it would be possible for you to receive a portion of the stock?

A. No. I can recall now that in the conversa-

(Testimony of Elmer M. Hyland.)

tions with Mr. Bassick, both in 1939 and 1940, he asked me to have patience, that he wanted me to have the same patience and confidence in the board of directors that he had, as he felt certain that they would fully live up to their promise that both he and I would be properly taken care of.

Q. Summing this up, as I understand your answer around the latter part of 1936 and thereafter you did receive assurances from Mr. Bassick and Mr. Moores that when, as and if the board decided to distribute this stock that you would receive a portion of it? A. That is correct.

Q. And that in 1939 and 1940 there were numerous occasions when Mr. Bassick positively assured you that you would participate in the stock distribution, but did not tell you when you could expect that distribution, or what circumstances would have to take place, or what would have to occur before the distribution would be made. Does that sum it up?

A. That sums it up. Mr. Moores also made this assurance in 1939 and 1940.

Q. I presume that, in substance, his assurances were of the same character as Mr. Bassick's?

A. That is correct.

Q. But Mr. Moores became no more definite than Mr. Bassick as to when or under what circumstances you could expect distribution?

A. That is right.

(Testimony of Elmer M. Hyland.)

Q. Now, were Mr. Moores and Mr. Bassick the only members of the board with whom you discussed this subject? A. Yes.

Q. And I take it that you never appeared at a formal board meeting [588] of The Joshua Hendy Iron Works? A. Never during that period.

Q. You never received from that board a formal assurance, either verbally or written, that you would at some future time receive the stock?

A. No, I felt that my contact in all of those matters was with Mr. Bassick, as President, and Mr. Moores, as Vice-president.

Q. I think you said something, Mr. Hyland, about, in these conversations with Mr. Moores and Mr. Bassick in connection with these assurances, that the stock was always the main consideration in your mind: is that correct?

A. That is correct. However, I was given to understand that the deficiency in the salary would be properly adjusted, and I always understood that as being principally through the distribution of stock.

Q. You were then considering the prospect of the distribution of the stock to you as the very primary and main consideration rather than the payment of additional compensation in the form of money?

A. I was hopeful of the stock distribution because of my long connection with the plant, and I

(Testimony of Elmer M. Hyland.)

wanted to be a substantial owner in that organization.

Q. You felt that you had been and were being underpaid for your services during the period following the confirmation of the plan and the time during which you had these various conversations with Mr. Bassick and Mr. Moores?

A. I did not only think it, but I definitely knew it, because I had offers of a position where I could go and get more than what I was getting.

Q. But notwithstanding those offers, and I think one amounting in 1938 to \$12,000 a year, notwithstanding those offers you nevertheless stayed on with the Hendy Company in the expectation that you would some day participate in the stock distribution? [589]

A. That is correct, stock, or cash, or both.

Q. That is your answer, even though you have admitted that the time when you would receive the stock was indefinite and uncertain, and the amount of stock that you would receive was indefinite and uncertain?

Mr. Ferguson: I think that is argumentative, if your Honor please, and immaterial.

The Court: Sustained.

Mr. Jordan: Q. It is true, is it not, Mr. Hyland, that on January 28, 1937, your salary was established by the board of directors at \$400 a month, was it not?

A. That I do not remember, the records will show.

(Testimony of Elmer M. Hyland.)

Mr. Jordan: Will it be stipulated that is a fact?

Mr. Ferguson: If that is what the answer to the interrogatories shows that is a fact.

Mr. Jordan: But the answer to the interrogatories does not list it month by month, but by years.

Mr. Ferguson: That appears to be correct, Mr. Jordan.

Mr. Jordan: In any event, Mr. Hyland, it is true, and if you cannot remember this I am sure that we can get it by stipulation, in fact I think it is already in, but I want to address it to you: You had received from March 24, 1936 to December 31, 1936 \$3500?

A. Yes.

Q. And that would have been approximately \$400 a month for the nine months' period. You did receive for the year ending December, 1937 \$4775?

A. Yes.

Mr. Ferguson: That is so stipulated, Mr. Jordan.

Mr. Jordan: And the total for 1938 \$6000, \$6700 for 1939, and \$25,241.57 for 1940?

Mr. Ferguson: Those figures are all stipulated to, Mr. [590] Jordan. Those are salaries as well as cash distributions.

Mr. Jordan: That is right, but I want to bring out again that the total compensation received by Mr. Hyland during this period was \$46,216.57.

Q. Now, let us get to the physical condition of the plant in 1934. You said, Mr. Hyland, that the plant was in very bad shape at that time, and was

(Testimony of Elmer M. Hyland.)

run down, and badly in need of fixing up. As a matter of fact business was very poor at that date, was it not? A. Very bad.

Q. 1934 was the low ebb year so far as business generally was concerned, and that was true with the foundry and machinery business?

A. Yes, particularly that plant, it was practically flat.

Q. And the orders were very few and money was very scarce? A. That is true in 1934.

Q. There was not any money to fix the plant. That is about the substance of it, is it not?

A. Well, the plant should never have needed fixing up; had it been properly taken care of progressively, year by year, it would have been entirely unnecessary in any one period to have started in to overhaul 90 per cent. of the tools as well as the building.

Q. From 1934 to 1936 there were some improvements made in the plant, *physically*?

A. Yes, not to any great extent, though.

Q. To some extent? A. To some extent.

Q. And business conditions generally were improving during that period, were they not?

A. Yes.

Q. There were more orders coming in and there was more activity at the plant?

A. That is right.

Q. The overhauling of the building and the equipment and machinery on a more extensive scale

(Testimony of Elmer M. Hyland.)

began, as I understand it, [591] after the time of the confirmation of the plan of reorganization?

A. That is right.

Q. And from the confirmation of the plan on through to the date of the sale of the plant the condition of the business, generally, was pretty good, was it not?

A. Yes, there was a continual improvement, I would say, from 1936 on.

Q. That is, business conditions generally?

A. I would not say business conditions generally, but I think that by reason of the efforts that were exerted by the management additional orders were secured; the orders did not pour in, it was a case of going and get them.

Q. And you have been connected, or had been, with The Joshua Hendy Iron Works for a great many years, and you have seen it rise and seen it decline, and so on throughout the years. Did you feel, in the light of your familiarity with the business through those years, and your knowledge of the way things were going in the fall of 1940, that the business could have been continued profitably under the same management?

A. Yes, that is my opinion.

Q. Those improvements that were made during the period following the confirmation of the plan, installation of machines, capital improvements, they were all sold with the plant, were they not?

A. Yes.

(Testimony of Elmer M. Hyland.)

Q. In other words, the whole operations down there, the whole plant was sold lock, stock and barrel? A. Yes.

Q. Just a couple of more questions, Mr. Hyland. Do you know where the money came from that was used to buy these capital improvements, machinery, tools, etc.?

A. I do not, that was out of my line.

Q. Did you have any inventory on hand at the plant at the time that [592] the plan was confirmed in March, 1936—you should be familiar with that?

A. Yes, we had an inventory.

Q. Isn't it true that a great deal of that inventory was sold subsequent to the confirmation, converted into cash somewhere around \$90,000 worth?

A. Well, I had nothing to do with the sale. We had certain materials on hand in the way of machinery that naturally we sold when we had the opportunity to add to our stock other lines and replace that which was sold.

Q. But it is true, is it not, that they did sell machinery subsequent to the confirmation of the plan?

A. Well, we made every effort possible to sell any machinery that we had on hand for sale, and we were quite successful.

Q. That is what I want to get at. You made every effort and those efforts were rewarded and you did sell? A. Yes.

Q. A substantial amount of inventory and old machinery?

(Testimony of Elmer M. Hyland.)

A. I don't know about old machinery. When you say "old machinery" you are not talking about the plant equipment, that is tools that were installed. You are speaking of machinery that we had on hand for sale?

Q. Yes.

A. Yes, we did sell considerable of it.

Q. And machinery that was not operative, in the sense that you did not use it in the plant?

Mr. Ferguson: No, he has testified it was not plant equipment.

Mr. Jordan: Q. I will ask you this question: Do you understand what capital assets is?

A. Yes.

Q. Were any capital assets, as you define them, sold subsequent to the confirmation of the plan in 1936?

A. Yes, but they would be of a very small value. I believe that we sold one of the obsolete lathes.

[593]

Q. That had previously been in use at the plant?

A. That is correct.

Q. Then in addition you sold a substantial amount, did you not, of inventory on hand.

A. Yes.

Mr. Jordan: I think that is all.

Mr. Ferguson: No questions.

Mr. Jordan: Mr. Ferguson, would you like to stipulate to the total amount of money which was

(Testimony of Charles B. Moores.)

expended by the company following the confirmation of the plan for additions to the Sunnyvale plant and equipment?

Mr. Ferguson: I do not want to enter into **any** stipulation. We are going to bring the figures in and prove them by the accountant. If it is not then proved I will enter into a stipulation.

Mr. Jordan: Are you going to repudiate your sworn answers?

The Court: Do you wish to introduce those in evidence?

Mr. Jordan: Very well, your Honor. I will do that during the rebuttal.

The Court: That will save time.

CHARLES B. MOORES,

Recalled for Defendants and Petitioners.

Mr. Ferguson: Q. Mr. Moores, in your examination by Mr. Jordan reference was made only generally to conversations that you had with Mr. Bassick and Mr. Hyland and Mr. Levit. Can you tell us when your first conversations were held with respect to the distribution of stock or compensation of these officers or these employees, and by the way, with whom it was held, and where?

A. Well, you are speaking of the conversations with Mr. Bassick?

(Testimony of Charles B. Moores.)

Q. Suppose you take Mr. Bassick first, if you please, and can [594] you tell us when you had your first conversation with Mr. Bassick regarding his compensation?

A. Prior to his appointment as a receiver in the State Court case in March, 1934.

Q. Where was that conversation held?

A. It was held in the bank and in the office of The Joshua Hendy Iron Works, which was then at 200 or 300, Pine and Battery streets.

Q. What was the conversation at that time?

A. Well, when he first went in as Receiver and the auditor's examination was made it looked as if it was merely a matter of liquidation, and I had suggested to him that he take the position at a compensation of \$350 a month, and then the court would probably grant additional compensation when he proceeded with liquidation.

Q. Prior to that time had he ever been employed by the Bank of California?

A. No, he had not.

Q. Or, to your knowledge, by any of the other creditors? A. No, I am sure he had not.

Q. When was your next conversation with Mr. Bassick?

A. It was very shortly after that when, as a result of his examination of the business affairs and the audit was made by Mr. Bourne——

Q. Mr. Bourne was a certified public accountant?

(Testimony of Charles B. Moores.)

A. A certified public accountant, he examined the books at the time of the death of the former receiver, Mr. F. J. Behneman, and Mr. Bassick advised me that he thought a better liquidation could be accomplished if the business could be continued to operate for a trial period of a year or two, he thought there was a possibility that it did have a going concern value, and if it did and there was an opportunity to sell it, that could be presented to the court.

Q. You have, of course, from that time up until the time of the sale, had numerous conversations with him, both with respect [595] to compensation and other compensation?

A. Frequently. I was in touch with him sometimes five or six times a week, and sometimes that many times a month.

Q. When was your next conversation with Mr. Bassick?

A. Well, in the conversation to which I just referred, when it was demonstrated or we were willing and considered it was advisable to continue for a trial period, the compensation I believe then was agreed upon at \$600 a month. That was plus whatever receiver fees were allowed, of course. I was merely representing a creditor.

Q. That was during the State receivership?

A. Yes.

Q. Did you have any other conversation regarding compensation prior to the time that a peti-

(Testimony of Charles B. Moores.)

tion was filed under the 77B proceeding here involved?

A. Not prior to the filing of the petition, no.

Q. Subsequent to the filing of the petition did you have any conversation with Mr. Bassick regarding compensation?

A. Yes, before the adoption of the plan.

Q. Can you fix the date as definitely as you can?

A. It was the first quarter of 1936.

Q. Sometime in 1936 prior to the confirmation of the plan? A. Yes.

Q. Where was that conversation held?

Mr. Jordan: Was it the answer that it was in 1936, prior to the confirmation of the plan?

A. A month or two prior to the confirmation of the plan.

Mr. Ferguson: Q. Where was that conversation had?

A. It was held in the office of The Joshua Hendy Iron Works.

Q. Who was present, do you recall?

A. Mr. Bassick and I.

Q. What was the conversation?

A. The conversation related to the portion of the plan whereby half, or 2112½ shares of stock [596] was to be set aside for the benefit of the management.

Q. You are referring to that provision of para-

(Testimony of Charles B. Moores.)

graph 6G of the plan of reorganization then under consideration?

A. Yes and Mr. Bassick knowing, or presuming that I would be one of the directors nominated by the Bank of California, as a creditor, took the matter up with me as a representative of that particular creditor, and asked me what the distribution of stock meant, to whom was it going to apply, and I said that I believed——

Mr. Jordan: Just a moment, now. If your Honor please, I am going to object to any expression of opinion by this witness regarding the meaning of that term “successful rehabilitation” as used in the plan.

The Court: Sustained.

A. I am not speaking of rehabilitation.

Mr. Ferguson: Q. Can you tell us just exactly what the conversation was, omitting any expression as to your intention?

The Court: His opinion.

Mr. Jordan: Did the question relate to any inquiry about rehabilitation?

The Court: The witness has made the remark that it did not.

A. It had nothing to do with rehabilitation, it had something to do with the stock that was to be set aside, and what our attitude would be.

Q. You said what was to be done with it?

A. I said what my opinion would be if I was one of the directors.

(Testimony of Charles B. Moores.)

Mr. Ferguson: My question is, I am trying to elicit the conversation.

The Court: Q. State what you said.

A. I told him that as a director of the company I would consider that the stock was to be distributed to those people who were [597] active in the management of the company, and Mr. Bassick inquired as to whether that included him, and I said I thought it meant to all in the position of managerial authority, such as himself, and the sales manager, and plant manager, and engineer in charge of the plant, and it might develop that other people would during the course of operations come under that section, certain employees of the company.

Mr. Ferguson: Q. Was there anything further in that conversation?

A. Well, he asked me in what proportion it would be distributed, and I said that would be impossible to determine in advance of the rehabilitation.

Q. Now, did you have any further conversation before the confirmation of the plan, do you recall?

A. I do not recall any other.

Q. Did you have any conversation immediately following the confirmation of the plan with Mr. Bassick?

A. As to his compensation, yes.

Q. When was the first conversation?

(Testimony of Charles B. Moores.)

A. Immediately after the confirmation of the plan, I was a director of the company.

Q. Can you place the approximate time of this conversation you are speaking of?

A. Shortly after the adoption of the plan of reorganization, I believe in April, 1936; I was in frequent conversation with him in his office and he asked me then what was the intention with regard to his compensation, and I said in the present condition of the company we would appreciate it very much if he would accept the same salary that he had been receiving, which was \$600 per month.

Q. Was anything said at that time with relation to distribution of stock?

A. Yes, that eventually he could look forward to being rewarded by the distribution of stock.

Q. Was anything said about the condition on which it was to be [598] distributed?

A. Nothing definite.

Q. When was your next conversation with Mr. Bassick?

A. Well, after the close of business each year, when the financial statement for the previous year's period was available there was a periodical conversation with regard to compensation, and sometimes the month before the end of the year. I think toward the end of 1936 the matter of adjusting his salary and some of the others was taken up by him with me, and was submitted to the directors meeting, and I think they will appear in the minutes

(Testimony of Charles B. Moores.)

of the directors meetings. In 1937, after the annual report was available, he spoke to me again about his salary, and thought he was very much underpaid, and I agreed with him he had been underpaid, but I did not feel that the company was in a position to grant any definite commitment as to his fixed salary, that it had better await the result of each year's operation, that I felt sure that the directors would compensate him for what he had done in the past year. That was done in various years from time to time.

Q. As I understand, it was at least an annual talk as the end of each year's operations became available? A. Yes.

Q. Did you discuss it oftener than that?

A. I think my discussions with Mr. Bassick were replete with the idea, with the statement that he was very distinctly underpaid, in view of the fact his predecessor had received \$12,000 a year, and he was making a success of the business, and was receiving much less.

Q. During these conversations was discussion had with respect to the distribution of stock?

A. Yes, he asked when the stock was going to be distributed, and I told him that was a matter for the board, I did not think it was an opportune time to bring it up before the board. [599]

Q. When did you tell him that, if you can recall.

A. In 1936, 1937, 1938, the question of stock

(Testimony of Charles B. Moores.)

was brought out, and my point of view expressed to him that the stock had not any value if it was delivered to him then, it would be merely an idle gesture on our part, or on the part of the directors, but that when the stock developed a value it was time enough to discuss that. In 1939, when it was indicated that there was some value in the stock he brought that matter up again, and we called a meeting. I said when the stock had a value would be an opportune time, and it had an indicated value, but one swallow did not make a summer, it might have less value or no value at the end of the year. At the end of 1938 that fact had been borne out, there had been a loss in the operations, so that the stock at the end of 1938 had no value. As the year 1938 progressed there was work going on in the shop, a large job had been taken on on which a profit was indicated, but which had not yet been proven, but the interim statement rendered by the accountant for the company did indicate that there would be a value for the stock.

Q. That is, as I understand it, at the end of December, 1938, the balance sheet shows a loss for the year, there was work in progress for which payment had not been received the following year?

A. There was a job, and that, I think, ran about \$850,000, on which we would make a profit of \$150,000.

Q. Now, how about 1940, did you have any discussion with Mr. Bassick during the year 1940?

(Testimony of Charles B. Moores.)

A. I do not think I quite completed 1938.

Q. Pardon me. Will you continue?

A. In 1938 Mr. Bassick addressed a letter to Mr. McIntosh, Chairman of the Board of Directors of the Bank of California, stating that he felt a profit had been made.

Mr. Jordan: I think that letter, if we are going to [600] discuss it, would be the best evidence, and if it were here I would object to it on the same grounds as that last letter.

Mr. Ferguson: Perhaps instead of taking time now we will accumulate those letters and we can put them in in chronological order.

The Court: Mr. Ferguson, how many more witnesses will you have?

Mr. Ferguson: I believe one, perhaps two, after Mr. Moores.

The Court: How long will it take to close your case?

Mr. Ferguson: I think we can complete by tomorrow, if your Honor please.

The Court: The reason I am asking you is, it will be necessary because of other business to adjourn today at 3:00 o'clock. I would like to finish this case today or tomorrow.

Mr. Ferguson: I think that may be done. After Mr. Moores we contemplate calling an accountant from Mr. Forbes' office, with rescept to the actual figures shown on the books of the corporation, and it depends upon that examination whether addi-

(Testimony of Charles B. Moores.)

tional witnesses may be called or not. That is my present intention, if your Honor please.

Mr. Jordan: I see no reason why we should not be able to complete the testimony today.

Mr. Ferguson: No, I do not think so. Does your Honor wish oral argument in this matter, or prefer to have it submitted?

The Court: I do not know. It depends on what time we have when you finish the evidence. If we have time and you wish to make oral argument, I will be glad to hear it. If not, it may be submitted.

Mr. Ferguson: I might say for the Court's information, I [601] have here the other letters I propose to introduce in this connection.

The Court: Can you ask Mr. Moores some other questions and permit Mr. Jordan to go through them during the noon recess?

Mr. Ferguson: Perhaps I can. I can hand these to Mr. Jordan and I can go to Mr. Hyland.

The Court: You can read those during the noon hour.

Mr. Ferguson: Q. Leaving for the time being, Mr. Moores, the correspondence with Mr. Bassick and other conversations with him, and turning to Mr. Hyland, did you ever have any conversation with Mr. Hyand regarding his compensation?

A. Yes, I had conversation with him on one or two occasions at Sunnyvale and on one or two occasions in the office.

(Testimony of Charles B. Moores.)

Q. When was the first of those held?

A. Well, I listened to Mr. Hyland's testimony and I think his recollection of them is in accord with my recollection, if that will serve the purpose.

Q. Then at the first conversation with Mr. Hyland, what he said, is your recollection the same as Mr. Hyland's?

A. My recollection is very much the same as his. As a matter of fact, he recalled something to my memory that I had not recalled, which I now recall.

Q. Referring to all of Mr. Hyland's testimony, do you agree in his statements as to his compensation?

A. I do.

Q. Do you have anything to add to his statement regarding compensation, or distribution of stock?

A. Well, there is something that did occur to me, I don't know whether it is a proper subject for me to bring up. He told me, after having left the employ of the Sunnyvale Company, the Joshua Hendy Iron Works, that he was offered a position with them at a higher salary than [602] he had got when he left, which was indicative of the fact that the position which he occupied was deserving of a much higher salary than he had ever received in the employ of the company. There was never any question in my mind, or any of the directors' but that all of the officers of the company were working for less than their position, such as they occupied, was worth.

(Testimony of Charles B. Moores.)

Q. Is there anything further you wish to add to Mr. Hyland's testimony regarding these conversations? A. No.

Q. Referring to Mr. Levit, you heard Mr. Levit testify on the stand? A. Yes.

Q. Referring to Mr. Levit's testimony, do you similarly concur in his testimony regarding your conversations with him?

A. There is no difference in my recollection from that expressed by him.

Q. Do you have anything to add about these conversations that he may have omitted?

A. No, I cannot think of anything.

Q. In other words, you think his testimony fully covers his conversations? A. Yes.

Q. In the early part of your examination this morning you referred to an audit and report made by Mr. Bourne as of the time that Mr. Bassick went in as receiver of the company. A. Yes.

Q. I hold in my hand a report and ask you if that is the report that you refer to?

A. That is it.

Q. A copy of it?

A. Yes, that is the original report.

Q. This report was delivered to you in the normal course of business, was it?

A. Yes, it was delivered to the Bank of California as a creditor of The Joshua Hendy Iron Works shortly after its completion. It is dated March 27. It was several months after that before

(Testimony of Charles B. Moores.)

it was delivered. I think it was delivered along in June to me. [603]

Q. It is dated May 22, 1934, covering the period as of March 27, 1934.

A. It was received on May 22, or shortly thereafter.

Q. This report was delivered to you, you say, as a creditor in the course of business, to reflect the assets of the Joshua Hendy Iron Works as they were shown on their books at that time?

A. Yes.

Mr. Ferguson: If your Honor please, I offer this as Petitioner's Exhibit next in order.

Mr. Jordan: I am going to object to the admission of this report, which covers a period—that is a report as of that date—I presume it covers a period prior to March 27, 1934.

Mr. Ferguson: That is a report of what the books show as to the assets and liabilities of the corporation as of that date.

Mr. Jordan: I will object to the introduction of this report on the ground that it can have no possible bearing on this case, it is a matter of two years almost to a day prior to the date of the confirmation of the plan. It is only the period, as I understand, from March 24, 1936 to the date of the sale of the plant that we are interested in. I do not think there is any benefit to be gained by cluttering the record with it. What bearing could it have, the condition of the company in 1934?

(Testimony of Charles B. Moores.)

The Court: It shows the financial and physical condition of the company before the reorganization?

Mr. Ferguson: Yes.

The Court: It may be admitted and marked.

(The document was marked "Respondents' Exhibit B.")

Mr. Ferguson: Q. I show you here what purports to be a pro forma balance sheet dated September 30, 1940, and ask you if you recognize it.

A. That is the usual form of monthly [604] report made by the company's own accountant, as to the estimated condition of the company at the date as of each report, which in this case was September, 1940.

Q. And that was received by you in the normal course of this company's business?

A. Ordinarily these were received about the 15th of the month following the last date.

Q. This is not an auditor's account, but is a pro forma sheet made by the company's auditor?

A. Yes.

Q. Under your practice? A. Yes.

Mr. Ferguson: I offer this, if your Honor please, as Defendant's Exhibit next in order.

Mr. Jordan: To which I object on the ground that it is hearsay, and I take it Mr. Moores did not prepare it.

Mr. Ferguson: No.

(Testimony of Charles B. Moores.)

A. It was prepared by the company's accountant.

Mr. Jordan: Q. For that reason you cannot vouch for those figures, can you, personally?

A. No, I would not vouch for their accuracy, except that they are figures that were accepted by the board as being indicative of the progress made by the company in the interval between the time that auditor's statements were available.

Mr. Ferguson: It is a pro forma sheet and can be proved by the books of the company, I take it. This is a report made in the normal course of business, as testified to.

The Court: You have endeavored to impress the court with the fact that it is unnecessary to have an examination made of these books.

Mr. Jordan: I do feel that way about it.

The Court: If you do, then why object to this report?

Mr. Jordan: Might I ask this, would it be possible to have [605] in court the gentleman who made that.

Mr. Ferguson: No, I have advised you that it would not be. I said you could inspect the books with your accountant.

Mr. Jordan: He did during the noon recess yesterday, and there was some discrepancy, as I understand it, and I told you that I felt we did not want to stipulate that it be put in.

The Court: This same report, you mean?

(Testimony of Charles B. Moores.)

Mr. Jordan: This very one we are talking about now.

The Court: I think I shall admit it unless you wish to insist that you be permitted to make an examination of the books.

Mr. Jordan: I will withdraw the objection, I do not want to do that.

The Court: Very well, it may be admitted.

(The document was marked "Respondents' Exhibit C.")

Mr. Ferguson: Q. Now, Mr. Moores, immediately following the confirmation of the plan of reorganization what was done with the stock? Let me take it in chronological order: Was all of the stock transferred to the Trustees at that time?

A. No, it was not all.

Q. What stock was not surrendered?

A. Dr. Behneman's stock amounting to 1244½ shares, I think.

Q. That is the Dr. Behneman here involved?

A. Yes, H. M. F. Behneman.

Q. With the exception of his stock what was done with the stock certificates?

A. The stock certificates were delivered to the secretary of the company, properly endorsed, voting trust certificates were issued to the depositors for their beneficial interest, signed by each of the directors, and signed, I believe, by the beneficiaries.

Q. As a matter of fact, these trustee's certificates were issued [606] in duplicate and signed

(Testimony of Charles B. Moores.)

both by the beneficiary and by the trustees?

A. Yes.

Q. That is, with the exception of Dr. Behneman?

A. Yes, with the exception of Dr. Behneman.

Q. What was done with the stock in the meantime? Was that transferred to the name of the trustees?

A. The stock was transferred to the names of the then board of directors, who were all voting trustees.

Q. That is all the stock except that of Dr. Behneman?

A. All except the stock which had not been deposited by Dr. Behneman.

Q. As I understand it, Dr. Behneman, according to the testimony here, did surrender his stock in June, 1940, is that correct? A. Yes.

Q. It was approximately in June. At that time trustee's receipts and certificates were issued to him?

A. Were issued to him, though he did not surrender all the stock; there was certain stock he was unable to locate, which has already been testified to.

Mr. Jordan: I will stipulate that there were certificates issued to Dr. Behneman in the amount of 152 $\frac{1}{4}$ shares, and in the amount of 303 $\frac{1}{2}$ shares, those being issued by the voting trustees of The Joshua Hendy Iron Works and signed by the beneficiaries but there is, however, not included in that

(Testimony of Charles B. Moores.)

aggregate the other trustees certificates showing the balance to Dr. Behneman.

Mr. Ferguson: But there was a similar certificate for that?

Mr. Jordan: There was, but we could not find it.

Mr. Ferguson: I will offer these next in order.

[607]

The Witness: This one was merely overlooked.

Mr. Ferguson: To make the record clear, if this is the one that was overlooked we will include it.

Mr. Jordan: I do not care whether you do or not. Do I understand you are making some significance of the certificates, themselves?

Mr. Ferguson: I think from the inquiry you made that the stock certificates may have some significance in this case.

Mr. Jordan: If there is some significance to them I think we should have them all.

Mr. Ferguson: Do you want to me include it in the same exhibit?

Mr. Jordan: That is quite all right.

(The certificates were marked "Respondents' Exhibit D.")

Mr. Ferguson: Q. Now, prior to the time that the stock was delivered out of the hands of the voting trustees, I understand that some stock belonging to Mrs. Hendy was surrendered, is that correct?

A. Yes, by Mrs. Albertie M. Hendy, Mr. Hendy's wife.

(Testimony of Charles B. Moores.)

Q. It has already been pointed out, I believe, in the meeting of the directors of March 18, 1940, a compromise in that regard was approved by the board. What was done with her stock?

A. It was returned to the treasury of the company.

Q. Now, then, next what was done with the stock certificates?

A. There was nothing done with the stock certificates until the time of the distribution of the 2212½ shares to the management, as I recall. The issuance to the stockholders might have antedated that, but I am not quite sure of the sequence of it.

Q. The trust was finally terminated by the board of directors and also approved by the trustees?

A. Yes.

Q. And if I understand correctly, the stock was transferred out [608] of the name of the trustees, and upon surrendering of the voting trust certificates trustees' certificates were returned as to 1907¾ shares to persons who held old stock, and as to 2212½ shares to Bassick, Hyland and Levit?

A. Yes.

Q. Calling your attention to the meeting of the board of directors of November 21, 1939, I hand you the minute book of the company, and having examined the minutes of that meeting, does that refresh your recollection of the transaction involved?

A. That was November, 1939?

Mr. Jordan: I think maybe we can stipulate

(Testimony of Charles B. Moores.)

to that if you let me look through that. This relates to the reduction in 1939 of Class E unsecured notes pursuant to arrangement recited.

Mr. Ferguson: The resolution which I will offer recites that Class E stockholders, excluding the Bank of California, were offered a cash compromise, and in settling that that constituted a reduction to the extent of \$17,000 in the outstanding indebtedness of the company.

The Court: Does that relate to the 305 shares?

Mr. Ferguson: No, it does not. Perhaps we can clear up the 305 shares.

Q. The stock surrendered by Mrs. Hendy was 305 shares, is that correct? A. Approximately.

Q. That was surrendered by her to the company in satisfaction of an outstanding obligation owed by her to the company, is that correct?

A. Yes, it was.

Q. And that was her sole asset and that was the result of compromise negotiations between her representative and the company?

A. Negotiations between Mr. Bassick and her representative. I asked Mr. Bassick to investigate that and find out whether she had any other means of settling it, and Colonel Shores, I [609] think it was, made the suggestion that she give up her stock, which was done. I don't know what the negotiations between them were.

Q. That was ratified by the board of directors, and those were the shares that you testified were

(Testimony of Charles B. Moores.)

turned in to the voting trustees and by them turned over to the corporation to be cancelled?

A. Yes.

Q. That made the differential between 1907 $\frac{3}{4}$ shares and 2212 $\frac{1}{2}$ shares? A. Yes.

The Court: We will be in recess until 2:00 o'clock.

(A recess was here taken until 2:00 o'clock p. m.) [610]

Afternoon Session—2 o'Clock

CHARLES B. MOORES,

Recalled.

Direct Examination (resumed)

Mr. Ferguson: Q. I show you a letter dated December 28, 1936, Mr. Moores, and ask you if that was received by you from Mr. Bassick on or about the date it bears? A. Yes, it was.

Mr. Ferguson: If your Honor please, I am going to offer these, and I suggest that upon their receipt that they all be marked as one exhibit, because they relate to the same transaction. I offer this letter of December 28, 1936.

The Court: What is the substance of it?

Mr. Ferguson: These letters, if your Honor please, conform and run along with the conversations that were being held with respect to the compensation of these officers and distribution of stock.

(Testimony of Charles B. Moores.)

Mr. Jordan: Your Honor, I am going to object to all of these letters upon the ground that they constitute hearsay, and that they are self-serving. If your Honor sees fit to overrule that objection I feel that the letters, in any event, should be limited in effect to the state of mind of the individuals who wrote them, rather than go to the proof of the matters stated in the letters.

The Court: I have not read them.

Mr. Ferguson: These are being offered for the purpose of showing correspondence and negotiations between the directors and Mr. Bassick in regard to compensation and distribution of stock, and for that purpose only.

Mr. Jordan: I have read all of the letters during the noon recess, and I will submit the objections.

[611]

The Court: Overruled.

Mr. Ferguson: This first letter is dated December 28, 1936, on the letterhead of The Joshua Hendy Iron Works, addressed to the

“Bank of California, N. A.,
Sansome & California Sts.,
San Francisco, California.

“Attention Mr. Moores:

“Dear Mr. Moores:

“Replying to your letter of December 24th, it will be convenient to discuss the matters referred to almost any time. I plan to be at the

(Testimony of Charles B. Moores.)

Plant on Tuesday but will be available on Wednesday if this is agreeable to you and the others. If not Wednesday, you set the date and I will make my plans to conform to yours.

“I am very happy in your statement that the progress this company has made has, in the main, been satisfactory and that my continuance with the company has been taken for granted.

“When one works to rehabilitate a business and to build it up for the future, there are many things to be done in the way of redesigning and revising equipment and the securing of new products. In such work it is generally the practice to plow back into the business certain operating profits which otherwise might be carried forward to net profits. My object in trying to rehabilitate the business has been to so conduct it that the business would be placed in as strong a position as is possible and to appear attractive to anyone who in the future might be interested in its purchase.

“What policy to pursue along these lines should be considered and I will appreciate it if you will give it some thought.

“In considering progress made, I would like to have you feel that I recognize the importance of the very substantial and [612] painstaking help that has been given me by you in particular and the bank in general. I have

(Testimony of Charles B. Moores.)

received wonderful cooperation not only from the bank but from the employees of the corporation and for this I am grateful.

“Conditions are such, however, that I cannot afford to devote all of my time to the Joshua Hendy Iron Works on the same terms as now prevail and therefore hope you will give this matter further thought. In considering this matter further, I will appreciate it if you will give due regard to what will happen in the event of the sale of the business or a relinquishment of active control by the principal creditors.

“Please mark ‘personal’ any reply.

“Very truly yours,

W. R. BASSICK.”

(The document was marked “Respondent’s Exhibit E.”)

Q. Now, I think we had come to that point in 1936 when that letter was written, Mr. Moores. Was there any discussion had in connection with that letter, or subsequent thereto? A. There was.

Q. When was that discussion had?

A. I presume the day following that, for which the appointment was made, which would have been close to the following week.

Q. What was that conversation?

A. Well, I can give the tenor of it; it was to the effect that an increase in salary was approved for Mr. Bassick from \$600 to \$700 a month. That

(Testimony of Charles B. Moores.)

matter went on over a number of years and it is hard to identify which year that did happen.

Q. Was anything said at that time with respect to his suggestion to you that he could not afford to keep on working at the existing compensation?

A. Yes, that was brought out, that he was working for a salary that was not commensurate with his duties, that [613] he had other interests which he felt were more profitable, and it was pointed out to him that if through the management this company was successful, he would receive something of tangible value in the way of stock, tantamount in value, but that could be demonstrated only over a period of years by the amount of work that was done.

Q. The next letter that is in chronological order is a letter dated July 12, 1938. Did you have intervening conversations between the date of the last letter of 1936 and this letter of 1938?

A. Oh, yes, I am very sure we did have. I don't think a matter of more than two or three months went by but what the subject was brought up.

Q. There seem to be three letters in this series, the first appears to be a carbon copy of a letter to Mr. Bassick, dated July 12, 1938. Do you recognize that? Are those your initials there?

A. This is a copy of a letter which I had written to Mr. Bassick.

Q. And mailed to him on or about the date it bears date? A. On July 12, 1938.

Q. Then I show you a letter purporting to be a

(Testimony of Charles B. Moores.)

letter to you of Mr. Bassick, dated July 20, 1938. Did you receive that?

A. Yes, this was in reply to mine of July 12th.

Q. On or about the date it bears you received it? A. Yes.

Q. Then what purports to be a reply by you dated July 22, 1938. Was that letter mailed by you? A. Yes, that was a further reply.

Mr. Jordan: Pardon me, Mr. Ferguson. Will it be understood that my objection runs to the entire series of letters?

The Court: I thought you so designated when you made it. I so understood it.

Mr. Ferguson: I offer, if your Honor please, as Respondent's [614] Exhibit E-1, copy of a letter dated July 12, 1938, to W. R. Bassick, 206 Sansome Street, San Francisco.

"Dear Mr. Bassick:

"This letter is written so that you may have confirmation of the understanding of the creditors in making provision under the plan of reorganization of The Joshua Hendy Iron Works for distribution of 50% of the stock of the company to management.

"As stated in our conversation of yesterday, it was contemplated that a five year period would be necessary to demonstrate the success of the plan which can only be measured by the amount of liquidation of indebtedness that

(Testimony of Charles B. Moores.)

has been accomplished at the end of that period.

“Further provision was made for an extension of five years if, in the opinion of the directors, sufficient progress had been made to warrant continuance of the business beyond that time.

“It was recognized that the success of this plan depended upon continuity and ability of management. Accordingly, those men in key positions who are willing to remain with the company until such time as the results of their management have demonstrated the success of the plan will be entitled to participate in the distribution proportionately as, in the opinion of the directors, they have contributed to such success.

“As pointed out to you in conversation yesterday, a transfer of the stock at this time would be an empty gesture as it has no present value in view of the heavy indebtedness and a value can only be established by reduction in that indebtedness.

“Any further discussion with regard to distribution of this stock had best be left until the expiration of the five year period.

“CBM F “Very sincerely yours,”

(The document was marked “Respondents’ Exhibit E-1.”) [615]

(Testimony of Charles B. Moores.)

I offer as Respondents' Exhibit E-2, if your Honor please, the following letter on the letterhead of the Joshua Hendy Iron Works, dated July 20, 1938, to

“Mr. C. B. Moores,
c/o Bank of California, N. A.,
400 California, St.,
San Francisco, California.

“Dear Mr. Moores:

“This will acknowledge receipt of your letter of July 12th with regard to the discussion we had on July 11th concerning the Plan of Re-Organization of the Joshua Hendy Iron Works and the distribution of the 50% of the stock of the Company to Management.

“I have carefully read what you say in the body of your letter, and judge by the closing paragraph the door is closed for further discussion of the stock distribution at this time.

“I would like to make it clear that one of the main things which is disturbing the present active management of the business is: by whom the business is going to be controlled in the future, and what the future policies of the business are going to be. The feeling has been expressed by more than one member of the present management, that it is conceivable control of the Company might again pass into the hands of those who were responsible for its

(Testimony of Charles B. Moores.)

previous condition. I am pointing this out to you because this point is causing considerable doubt and discussion.

It would seem there must be some plan which can be worked out whereby the present active management will feel they can cast their lots in with the Company and be assured that in doing so their remuneration will be in accordance with their responsibility and the results achieved, and their future welfare and peace of mind provided for.

“I feel it would be very advisable that definite assurances be given to the present active management, that in remaining with the Company to the end of the five-year period or longer, —and al- [616] ways provided the good work already done is continued—they will not only have an interest in the business, but that with that interest will go a pleasant relationship.

“Very truly yours,

W. R. BASSICK.”

(The document was marked “Respondents’ Exhibit E-2.”)

Mr. Ferguson: I offer as Respondents’ Exhibit 3, a copy of Mr. Moores’ letter to Mr. Bassick dated July 22, 1938.

(Testimony of Charles B. Moores.)

“Mr. W. R. Bassick
206 Sansome Street, Room 706
San Francisco, California

“Dear Mr. Bassick:

“Your letter of July 20th, referring to mine of July 12th, has been received. You may assure anyone interested that no one will participate in distribution of the 50% of stock of The Joshua Hendy Iron Works except those who are directly employed by the Company and who contribute to success of the business during the five year period or such longer time as is required to demonstrate the success.

“I shall be glad to receive your suggestions as to proper distribution of this stock, that is, the persons whom you consider entitled to participate and the positions occupied by them as well as the number of shares to each.

“There need be no doubt of continuance of the existing pleasant relationship.

“CBM F “Very truly yours,”

(The document was marked “Respondents’ Exhibit E-3.”)

Now, the next communication I find, Mr. Moores, is dated March 18, 1940, and I will ask you whether or not between these letters of 1938, which have been introduced in evidence as Respondents’ Exhibits E-1, 2, and 3, you had any further [617] conversation with Mr. Bassick in this regard?

(Testimony of Charles B. Moores.)

A. At the end of 1939, or during December, 1939, figures showing the result of the four years period I believe were available, and in fact I am sure they were available as of November 30th, and in view of the estimate contained in this result of the first eleven months of operation, the directors decided to grant extra compensation to certain of the employees. I think that is a matter that has been testified to, it is in the minutes of that meeting held in December.

Q. Was there any discussion held with Mr. Bassick regarding possible distribution of stock?

A. Yes, that was discussed at that time, it was brought out in conversation with me by him that the stock now had, or it was indicated that the stock would have, or shortly have, a very tangible value, and that the deficit was now less than the capitalization of \$442,500, in other words, that there was a net worth; that it was not then indicated exactly what that value was, but the statement of December 31, 1939 demonstrated that there was a value of \$30 per share, or approximately that amount, a dollar or two one way or the other, and Mr. Bassick asked if it was not then the time to start distribution. We suggested to him, my original idea, of allowing it to go until further progress had been made, or until the cash was in hand to further reduce the indebtedness. There was no provision in the plan for issuance to the management of the beneficial interest, it merely said stock, and I believe it might

(Testimony of Charles B. Moores.)

have been considered jeopardizing the creditors remaining in control of the company if we could have distributed the beneficial interest rather than stock.

Q. Do you recall any other conversation that you had prior to the date of this letter, March 18, 1940?

A. After additional compen- [618] sation was voted in December Mr. Bassick then again emphasized in the latter part of February, or early in March, that he was still being underpaid, and some of the other employees were, and they would like an expression of the board toward an increase in salary for them. It was a repetition of what had gone on before, it went on again.

Q. And the same discussion regarding distribution of stock?

A. The same discussion with regard to distribution of stock and greater compensation.

Q. I show you what purports to be a copy of a letter by W. R. Bassick "To the Board of Directors, Joshua Hendy Iron Works, San Francisco, California," under date of March 18, 1940. Do you recognize that?

A. Yes, I recall that, and it was set forth very fully at the annual meeting, I believe, which was held on the 24th of March of this year, or very close to that date.

Mr. Ferguson: If your Honor please, I offer this as Respondents' Exhibit E-4, a letter on the letterhead of the Joshua Hendy Iron Works.

(Testimony of Charles B. Moores.)

The Court: It is along the same lines?

Mr. Ferguson: Yes, if your Honor please. He recites some of the reasons, in some more detail, why he believes this was the time to make the distribution.

The Court: Does your objection go to this letter?

Mr. Jordan: Yes. This is the letter I particularly had in mind when I said there were a number of figures set forth, which, again, are self-serving.

The Court: In view of the statement made by Mr. Ferguson before he offered these letters, do you wish to press that point? He said his reasons for offering the evidence were not for the [619] purpose of establishing the correctness of any of the figures that were stated, as I understood it.

Mr. Jordan: That is correct.

Mr. Ferguson: That is correct. These figures were taken from the records, but will be independently proved by the records, themselves.

The Court: It may be admitted and marked.

(The letter was marked "Respondents' Exhibit E-4.")

Mr. Ferguson: This letter is dated San Francisco, March 18, 1940.

"The *the* Board of Directors,
Joshua Hendy Iron Works,
San Francisco, California.

"Gentlemen:

"About four years having elapsed since the date of the re-organization of the Joshua Hendy

(Testimony of Charles B. Moores.)

Iron Works, it seems in order to review the accomplishments in the rehabilitation of the Corporation.

“It is gratifying to know that we have been able, in the main, to carry out the wishes expressed by Mr. C. K. McIntosh, President of the Bank of California, N.A. when W. R. Bas-sick was named Receiver of the Company on March 27, 1934. At that time Mr. McIntosh expressed the hope ‘that the business could be preserved.’ He stated that ‘a going business was an asset to a community and everyone connected with the enterprise and if the business had to be liquidated, there were bound to be some heavy losses for all parties concerned.’

“We feel justified in our feeling that the business has been preserved and that it has grown and given employment to many persons. Many of the old employees have been continuously busy since the first three months from March 27, 1934, in spite of the [620] very special nature of the business.

“With particular reference to the re-organization plan of March 28, 1936, the following payments made on old indebtedness are quite informative:”

Then follows a tabulation which will be meaningless if read, and may be deemed to have been read?

The Court: Yes.

(Testimony of Charles B. Moores.)

Mr. Ferguson: I will only refer to the results given, that is, under the different classes of notes, the amount paid, and the balance due as of March 18, and I will indicate that we have further tabulations to assist the court in that regard.

It shows under Class A notes, which are notes to the United States Government for income taxes plus accrued interest, the entire amount has been paid, \$2450.59, and there is no balance due.

It shows on account of the Class B notes, held by the Bank of California, amounting to \$263,376, \$213,376 has been paid, leaving a balance due of only \$50,000.

It shows that H. L. E. Meyer, Jr., who held Class B notes, had been paid in full \$10,296, and Julia Routzahn, who held B Class notes, had been paid in full \$6605.91.

It shows that Class C notes were \$80,000, and that is outstanding.

It shows that Class D notes were \$7405, \$5164.38 has been paid, leaving a balance of \$2240.62.

It shows of the Class E notes to the Bank of California, \$109,798.47 was unpaid.

To officers, employees and trade creditors, Class E notes, \$88,674.85, there was \$55,483.38 paid, leaving a balance of \$33,191.47. [621]

It also shows the payment of certain interest, but as we are going to put that in a separate schedule I won't bother with it. Then continuing:

(Testimony of Charles B. Moores.)

“All taxes applicable to the Plant and Pear Orchard at Sunnyvale, and to the Bay and Kearny Street Property, San Francisco, have been taken care of. These taxes amount to the total approximate sum of \$20,000.00.

“Taxes on the Orchard property are generally met by the income from the Orchard, but in 1938 the Orchard represented a loss, rather than a profit. Taxes on the Bay and Kearny Street Property are burdensome and every effort should be made to dispose of this property at as reasonable a price as can be obtained for it. It is, of course, difficult to sell choice property of this kind with the waterfront situation as it is.

“Social Security, Old Age Benefit, Sales, Franchise, Income and Excess-Profits Taxes have all been taken care of when due, and it is obvious that these taxes are becoming increasingly burdensome to the business and must be met and will be met out of earnings.

“Referring to the Plant at Sunnyvale, all of the principal buildings have been re-roofed and most of the machine shop has been repainted in the last two or three years. The water tower has also been repainted. A new 16 x 20. Vertical Boring Mill has been installed; also a new Turret Lathe; also a new 7 ft. Radial Drill and Annealing Oven, and certain small equipment, amounting to a total approximate sum of \$70,000.00.

(Testimony of Charles B. Moores.)

“The following amounts of depreciation have been charged off over the periods enumerated:

1934.....	\$27,676.07	
1935.....	36,901.43	
1936.....	25,855.76	
1937.....	26,267.92	
1938.....	27,833.73	[622]
1939.....	30,623.34	
<hr/>		
Total.....	\$175,158.25	

“Without taking into consideration the payment of the 1939 Franchise, Income and Excess-Profits Taxes—which will probably amount, in round figures, to about \$44,000.00—we will have, on March 15th, 1940, Cash on deposit in the Banks and due from the Government on Contract, approximately \$116,000.00 available for Working Capital and Accounts Payable.

“Practically the entire regular product of the Company has been re-designed and modernized, and several new pieces of equipment added. The Plant has been kept busy on many occasions on Placer Gold Dredge work, and a nice volume of this business in the last several years has kept the organization going. It should be noted that this is new business and bids fair to continue.

(Testimony of Charles B. Moores.)

“We have not yet developed as much new standard equipment as we would like to have in order to keep our large variety of tools busy, but we are continually seeking out new products suitable for our manufacturing facilities and are making some progress.

“In the process of rehabilitating the business, nearly the entire management personnel was changed around and their duties defined and responsibilities established. The result has been that key men were put in important positions which they were qualified to fill and a harmonious working organization established. Many records existing only in the minds of the personnel have been put on paper and made permanently available. This represents an asset of considerable value to the Corporation. In this connection it is gratifying we were able to utilize so many of the old employees, thereby getting the advantage of their long [623] years of experience and special knowledge of the business.

“Regarding the Sales outlook. It is of interest to note that during the last several years the Corporation has bid on and been awarded several important contracts covering Hydraulic Gates and Valves for various National and International Projects. Our experience in this class of work has enabled us to bid on and receive awards for this specialized work. In

(Testimony of Charles B. Moores.)

considering the method of selling our regular product, we had to choose between a direct sales force, or through Agents and established Supply Houses. In order to keep our overhead expenses down, considering that our regular line of products was *was* not sufficiently complete, the indirect selling method has been largely followed, except for local business.

“We have established in the last two or three years many foreign connections, some of which have proved to be of great advantage to the Corporation. One foreign connection has purchased thirty Mine Hoists in addition to other equipment, and has just placed an initial order for twenty Ore Cars. Other foreign connections have purchased Ball Mills and other mining equipment. We are using every effort to increase this foreign business *business*, particularly right now, and are meeting with fair success. In addition to the foreign connections, many domestic agencies have been established, most of which have proven their value.

“In conclusion, we wish to say we are particularly grateful to the financial interests which have made it possible to accomplish what has been done, for their support at all times, and for the patience and untiring efforts of the officers and representatives of the Bank; also to the Board of Directors for their interest and support, and to all of the employees who have

(Testimony of Charles B. Moores.)

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(Testimony of Charles B. Moores.)

so [624] loyally given their best efforts to make the Corporation successful.

“Sincerely yours,

W. R. BASSICK,

President.”

Q. The next letter I have is a letter to you dated April 8, 1940. Did you receive that? A. Yes.

Q. Between the time of the report to the board of directors, to which I have just referred, Respondents' Exhibit E-4, and the date of this letter, did you have any further discussions with Mr. Bassick?

A. I do not believe there was in that interval, no.

Mr. Ferguson: I then offer as Respondent's Exhibit E-5 a letter on the letterhead of the Joshua Hendy Iron Works, dated April 8, 1940. It reads:

“Mr. C. B. Moores,
c/o Bank of California, N.A.
400 California St.,
San Francisco, California.

“Dear Mr. Moores:

“In view of the progress made by the Joshua Hendy Iron Works during the last several years, and with particular reference to the showing for the year 1939 and the first two months of 1940, I want to again take up with you the question of my remuneration.

“For your information, I am giving here-with the income received from the Corporation

(Testimony of Charles B. Moores.)

since I took charge as Receiver on March 27, 1934.

Period	Salary	Bonus	Trustee's Fee	Total Earnings
3/27/34 to				
13/31/34	\$5000.			\$5,400.
1935	7200.			7,200.
1936	7200.			7,200.
1937	7200.		5,000.	12,200.
1938	7200.	\$1,800.		9,000.
1939	8100.	2,000.		10,100.
				[625]

“I had hoped that when you received the Financial Statement for the year 1939 and my letter to the Board of Directors as of March 18, 1940, that additional remuneration, in keeping with the circumstances, would voluntarily be given. In view of the fact that I have heard nothing, prompts me to take the matter up with you at this time. You will recall I have previously mentioned, on several occasions, that I do not feel the remuneration I am receiving is in keeping with the results obtained.

“Referring now to the statement of income given above, you will note that in 1937 I received a total amount of \$12,200. which is more than I have received in any one year since, which seems to me decidedly out of line, as since 1937 a much better showing has been made and a much better financial position assured the Corporation. I do not feel it is nec-

(Testimony of Charles B. Moores.)

essary to go into detail here regarding the confused conditions I found when I took the job, and the consequent disagreeable task I had to perform in connection with Court actions, reorganization, changing personnel and so on. You are familiar with the details and the circumstances leading up to bringing order out of confusion. I have given the Company the results of 35 years of manufacturing experience in all branches of the Manufacturing business, and set myself a very severe task in personally taking over the work of directing advertising, sales, production and purchasing, in order to keep down overhead expenses. You will, of course, appreciate that in being the active head of the business, I had to take on the full responsibility for the success or failure of the work, and I had to take final responsibility for the considerable risk involved in Government and other penalty bidding and manufacture.

“In view of the seeming *preemptory* refusal to consider my [626] increase the last time I talked with you on the subject, it is rather embarrassing to have to again bring the matter *up discussion*, but ‘a servant is worthy of his hire’, and if I am not being adequately compensated, I should be, and I feel sure that the representatives of the other creditors will endorse any reasonable arrangements. One should not be expected to work only for the profit of

(Testimony of Charles B. Moores.)

the Corporation, but should share with the Corporation in the results achieved. I have always felt since I have come with the Corporation, that the attitude taken by the principal creditor would be a generous one and that arrangements have been planned whereby I would be taken care of adequately, but now that several weeks have passed since you have had an opportunity to go over the results, and nothing has been said and no notice has been given me of additional compensation, I am forced to the conclusion that the matter has escaped the attention of those most interested, or some plans that I am not familiar with have been made for my benefit.

“In view of the fact that Mr. McIntosh asked me to become Receiver for the Corporation, and in view of the fact that I conferred with him as Receiver and Trustee during the first part of my services for the Company, I am sending a copy of this letter to him for his information and consideration.

“Very truly yours,
W. R. BASSICK.”

(The letter was marked “Respondents’ Exhibit E-5.”)

Mr. Jordan: If your Honor please, at this time, for the purpose of the record, I would like to move to strike all of the letters just read by Mr. Ferguson

(Testimony of Charles B. Moores.)

on the grounds previously stated in my objection, namely, that they constitute hearsay, are self-serving, and upon the further ground that they contain opinions and [627] conclusions which are not evidence.

The Court: The motion is denied. The last letter may be admitted and marked.

Mr. Ferguson: Q. Now, subsequent to April 8, 1940, did you have further conversation with him?

A. I had one conversation with him.

Q. When, in point of time, do you recall?

A. Probably within a week or ten days, or maybe two weeks, at the first opportunity after receipt of the letter.

Q. Where was that held, if you recall?

A. It was held at his office.

Q. What was the conversation?

A. It was a repetition of previous conversations, that he had not been properly compensated, and I still felt that the cash position of the company did not allow of the establishment of fixed compensation in excess of that which he had received; that by the time the particular job that had kept him reasonably busy during the past two years was accomplished and results known, that the board might consider further compensation to him, that I would be glad to consider it, and I thought the other members of the board would, that it was only another year before the first five-year term contemplated by the plan would expire, and that inasmuch

(Testimony of Charles B. Moores.)

as further profits might be made between then and the end of that year, that would look to me to be a very opportune time at which to discuss disposition of the stock, or a portion of it, or whatever, in the opinion of the board at that time, was justified.

Q. Was there any further conversation held following that conversation?

A. Yes, I think there was at least one or two more.

Q. Can you fix those in point of time?

A. There was one in June [628] or July, 1940, and then there was another one when the possibility of sale of the business was under discussion.

Q. Let us refer to the one in June or July; what was that conversation?

A. Well, at that time the big job had been completed, and there had been a profit of in the neighborhood of \$200,000 on that job; the general contractors had paid \$15,000 bonus to the company for having delivered the material in advance of the term called for by the contract, and there was work on the Shasta Dam in prospect, but the drawings had not been submitted yet, so there were no bids; it looked then, there seemed to be a prospect that there would be more of that type of work coming up, and the torpedo tubes and gun mounts which Mr. Hyland mentioned in his testimony were in prospect, but that prospect was too remote, and the profit that might have been derived from that type of work was so small—it was based on a fixed fee

(Testimony of Charles B. Moores.)

of 6 or 7 per cent. of the estimated cost of the job, so it did not seem that the company, in its financial condition, would be warranted in soliciting that type of business; that if it became necessary for them to take it it might have been considered.

Q. I understnad that private work is more attractive than Government work. A. Yes.

Q. Was there any initial discussion had with respect to compensation or partial distribution of stock?

A. Well, it was reported, the results were very satisfactory, that there had been an inclination of the board that had been demonstrated to grant extra compensation; that each year no doubt that would come up again in December when the final results of the year's operations were known, and that when the distribution of stock was again solicited that would be a very opportune time to consider it.

Q. Now, you say you held a conversation at or about the time, [629] as I understand, that the sale of the business was being considered. When was that?

A. That would have been November 4, or 5, or 6. That was in the interim between the granting of the option—just previous to the granting of the option it was discussed in the meeting, at which the option was granted.

Q. Was that a discussion at which all the directors were present?

(Testimony of Charles B. Moores.)

A. All the directors were present at this discussion on November 4.

Q. What was that discussion?

A. Well, Mr. Bassick, in giving his opinion as to the advisability of disposing of the business, brought out that he and the other members of the management had been assured they would share in the business, that the business would be theirs, or they would have a substantial interest in the business when the creditors were satisfied that there was a rehabilitation, that that would mean perhaps at the end of another five years, or whatever time was necessary to demonstrate the success of the plant which might have already occurred, but really they were the ones primarily interested, rather than the creditors, that is, they were to receive this stock and that in their opinion it should be given additional weight on that account. I pointed out to them the corporation was still involved to a substantial amount, that they were holders of an equity which they could look forward to as coming to them, and all of this had to be considered. It was also brought out by me that the plan of the purchaser was not to continue his employment, that it meant that he was out of a job, and that some consideration should be given to that, and that it had been held out to him all of these years as time went on his remuneration would be increased, and there was no possibility of that if he was no longer to be employed. That was all [630] part of the discussion

(Testimony of Charles B. Moores.)

preliminarily to the granting of the option by the board of directors.

Q. That is part of the discussion referred to in the minutes of November 4? A. Yes.

Q. Apparently there was a general discussion regarding the distribution of the shares of stock in accordance with the terms of the plan?

A. Yes, that was also discussed. He brought that point out as to who was to receive the stock, and how much they were to receive.

Q. Were there any other conversations prior to the distribution of this stock?

A. Yes. During the course of the next few days, while this option was still pending, Mr. Bassick, I think, brought up the matter, along the same line—you are speaking of Mr. Bassick?

Q. Yes.

A. He reiterated the argument that he had made before, and indicated that certain assets of the business, it was desirable to withhold from sale.

Q. What was said?

A. He said that he believed that considerable business could be done in the mining equipment business, and also government jobs other than defense jobs, such as they had been in the habit of doing, it would be advisable to hold the patterns, of which the company had a considerable number, or drawings, so that if the group who were to receive this stock in the company desired to continue that they might have those assets with which to continue.

(Testimony of Charles B. Moores.)

Q. What was your conversation?

A. I said that was a matter for them to consider when the creditors were satisfied, that I no longer had anything more—no position other than as representative of the amount of stock which the bank held.

Q. Were those patterns withheld from the sale?

A. They were not [631] included in the sale.

Q. But they were included in the sale. Will you explain that, please?

A. It developed that an inventory which was set forth on September 30 at a figure of about \$120,000 was an inventory of the value of \$40,000 less than that, and rather than adjust that inventory, we allowed the patterns to be substituted for that decrease in inventory. We otherwise would have had to adjust that.

Q. Does that conclude, in general, the conversations had with Mr. Bassick?

A. No, there was further discussion.

Q. When was that held?

A. It was after the exercise of the option. I was away at the time the option was exercised, I returned to San Francisco, about November 20, and at the subsequent meeting of the board the matter of the distribution of stock, and of an amount of cash to adjust the waiver of dividends on that stock that was to be distributed, the best means of properly compensating everybody who had been employed by the company and whose employment had

(Testimony of Charles B. Moores.)

been severed by reason of the sale of the business.

Q. Now, are those the discussions held in the board which were reported in the minutes, but upon which Mr. Bassick did not vote?

A. Yes. His opinion was asked, what he thought his entitlement to be, and what he thought the entitlement of each of the others to be; he was asked as to the salary of the employees, and that was discussed with other members of the board in general, and prior to the meeting, and I think it was discussed at the meeting, that that should come up at the meeting of the directors and we will decide it there.

Q. Was there any other conversation?

A. I do not recall any.

Mr. Ferguson: Now, Mr. Jordan, at twelve o'clock I had re- [632] ferred to some minutes of the special meeting of the board of directors held November 21, 1939, and I understand you consent now that the minutes with respect to the retirement of certain obligations may be introduced.

Mr. Jordan: So stipulated.

Mr. Ferguson: This is a special meeting of the board of directors of Joshua Hendy Iron Works, held on November 21, 1939. All of the directors were present. I am offering all of the minutes in so far as they relate to the redemption of Class E notes. The Class E notes were the unsecured notes under the plan that the creditors held.

(Testimony of Charles B. Moores.)

“On motion made by Director Moorers, seconded by Director Price, and unanimously carried, the following resolution was adopted:

“Whereas, the terms of the plan of reorganization of this corporation, the Joshua Hendy Iron Works, confirmed by the United States District Court on March 24, 1936, provided for the issuance, and this corporation did as of March 24, 1936 issue its unsecured five-year notes to the unsecured creditors of this corporation then holding claims which accrued prior to May 17, 1932, said notes being designated as ‘Class E’ notes; which said notes were issued and are outstanding in the aggregate principal amount of \$198,197.76, of which amount notes in the aggregate principal amount of \$109,798.48 are held by the Bank of California, N.A., and the balance, \$88,399.29, are held by 157 other creditors; and

“Whereas, it appears that this corporation will, on December 15, 1939, have on hand approximately \$60,000 available for the retirement of its outstanding obligations, either secured or unsecured; and [633]

“Whereas, the Bank of California, N. A. has agreed that this corporation may expend all of said sum of \$60,000 in the retirement of the unsecured ‘Class E’ notes of this corporation held by holders other than the Bank of California, N. A. on the basis of 70 per cent. of

(Testimony of Charles B. Moores.)

the principal amounts of said notes; the Bank of California, N. A. being willing, in such case, to stand by and not require that it be included in such offer, as is more fully evidenced by the letter from the Bank of California, N. A. to this corporation dated November 21, 1939, so agreeing, a copy of which letter is attached to the minutes of this meeting and hereby specially referred to; and

“Whereas, it appears to the advantage, benefit, and best interests of this corporation, and of all persons interested therein, that this corporation offer to pay the holders of its ‘Class E’ notes, other than the Bank of California, N. A., an amount of cash equal to 70 per cent. of the principal amount of said notes in full settlement and satisfaction of the same;

“Now, Therefore, Be It Resolved, that this corporation make a written offer to each of the holders of its ‘Class E’ unsecured five-year notes, other than the Bank of California, N. A., offering to pay each of said note holders, in full settlement and satisfaction of the notes held by them, an amount of cash equal to 70 per cent. of the principal amount of such notes so held by them; provided that each such note holder first present the unsecured five-year ‘Class E’ note held by him at the office of the corporation on or before December 15, 1939, at 5:00 p. m.

(Testimony of Charles B. Moores.)

or mail the same so that it will be received by the corporation prior to such time, and at the same time execute a form of satisfaction acknowledging that such payment is received in full satisfaction and discharge of such note so surrendered by [634] each of said stockholders;

“And Be It Further Resolved, that upon the presentation of each of said unsecured five-year ‘Class E’ notes of the corporation on or before December 15, 1939 at 5:00 p. m., or the receipt of the same by mail by this corporation prior to such time, and upon the execution of an appropriate form of satisfaction, as aforesaid, this corporation pay the owner and holder of each of said notes so presented, in full settlement and satisfaction of the same, an amount of cash equal to 70 per cent. of the principal amount of said notes; provided, however, that pursuant to the letter of the Bank of California, N. A., hereinabove referred to, this offer shall not be made to the Bank of California, N. A., on account of the ‘Class E’ notes of this corporation held by it.”

Then, of course, the resolution further continues to empower the President and Secretary to communicate the offer to the holders of the Class E notes and include a form of letter of transmittal and satisfaction to be filled in by the note holders, etc., and those are attached to the minutes, and

(Testimony of Charles B. Moores.)

also the consent of the Bank of California to a settlement on that basis and waiving participation in the distribution of funds in view of the redemption of these interest-bearing notes.

Q. Pursuant to that resolution I understand that these notices were sent out to all the note holders other than the Bank of California, and that a considerable number of them exercised their right to receive that 70 per cent.: Is that correct?

A. Yes, a considerable number did.

Q. So that in that connection \$38,686.87 was paid out on notes aggregating some \$55,000, so that there was a discount and saving to the corporation of \$16,580.19. Is that correct? [635]

A. I believe that amount is correct, according to my recollection.

The Court: I will continue this trial until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until tomorrow, Friday, September 26, 1941, at 10:00 o'clock a. m.) [636]

Friday, September 26, 1941—10 o'Clock A. M.

The Court: You may proceed in *Shores v. Hendy Realization Company*.

CHARLES C. MOORES,

Recalled.

Direct Examination (resumed)

Mr. Ferguson: If your Honor please, there were admitted in evidence yesterday two trustees' certificates, marked Exhibit D, and there was discussion with reference to the fact that there was a certificate missing for 470 shares issued to Dr. Behneman, and we are going to produce it, and I think it may be stipulated as part of the defendants' case.

Mr. Jordan: No objection.

Mr. Ferguson: At the close of the session yesterday we were referring to the minutes of the directors meeting held on November 21, 1939, which Mr. Jordan stipulated to, and we had referred to the fact that as a result of that there was a reduction of the unsecured notes in the sum of \$55,000 by reason of the 70 per cent. offer in compromise.

In addition, there is a second resolution showing the payment of certain secured indebtedness, which reads:

"On motion made by Director Moores and seconded by Director Webber, and unanimously carried, the following resolution was adopted:

"Whereas a letter has been received from The Bank of California, N. A., expressing their willingness to forego payment to them on 'Class B' notes of this corporation in order to enable immediate

(Testimony of Charles B. Moores.)

payment in full of the 'Class B' notes payable to Julia Routzahn and H. L. E. Meyer, Jr."—those "B" notes were [637] secured notes under the plan—

"in the respective amounts of \$5681.09 and \$8854.56, with interest at 4 per cent. from 3/24/39 to the date of settlement, with the understanding that such payment will leave The Bank of California, N. A. the sole holder of notes of this class, and that they shall receive payment of principal and interest in accordance with the terms of the notes.

"Now, Therefore, Be It Resolved that this corporation immediately pay such holders of Class 'B' notes in accordance with the terms of the offer by The Bank of California N. A., receiving from such paid note holders all proper papers showing the retirement of this indebtedness and relinquishment of their rights in the security to these notes.

"And Be It Further Resolved that the President and Secretary of this corporation be and they are hereby authorized for and on behalf of this corporation, and as it corporate act and deed, to immediately pay such holders of Class 'B' notes upon receipt of all proper papers showing the extinguishment of such debt and relinquishment of the collateral security."

(Testimony of Charles B. Moores.)

Q. Those payments so authorized were made, were they, Mr. Moore? A. They were.

Mr. Ferguson: I also desire to read a motion, a resolution from the minutes of the regular meeting of the board of directors held on March 18, 1940, this being done pursuant to a stipulation of Mr. Jordan.

Mr. Jordan: So stipulated.

Mr. Ferguson:

“A motion was made by Mr. Price and seconded by Mr. Webber and unanimously carried ratifying the payment to The Bank of California, N. A. of \$176,503.06, on account of Class ‘B’ notes held by that bank, with interest to the date of payment, and authorizing payment on March 24, 1940 of the accrued interest [638] to that date on the Class ‘B’ notes outstanding.”

Those were the same class of notes as those just referred to.

Q. I will ask you if that amount was paid to the bank. A. Yes.

Q. From what fund was that sum of \$176,000 paid?

A. From the regular cash account of the Joshua Hendy Iron Works.

Q. Did that represent refinancing of that amount? A. No, it did not.

Q. In other words, they paid it from operating revenue? A. From revenue of the company.

(Testimony of Charles B. Moores.)

Q. Now, I understand that you were familiar with the plant of the Joshua Hendy Iron Works?

A. Yes.

Q. And were familiar in 1934 and 1935 with that plant, is that correct? A. Yes.

Q. You were familiar with the Bourne reports which have been introduced through you?

A. Yes, I think so.

Q. Now, in the course of the testimony it has been referred to that at sometime between the time of the appointment of the trustee, and subsequently, that the book value of this plant was written down. Were you familiar with that write-down? A. I was.

Q. Did you have anything to do with the matter as a result of which it was written down?

A. I discussed the matter with Mr. Bassick, and I was present in court at the time that he made his report, and it was decided that it was for the benefit of the company that proper valuation of the assets of the corporation be made.

Q. When you say "proper valuation" of the plant, do you mean that the valuations prior to the write-down were improper?

A. They were obviously improper.

Q. You mean by "they were improper," they were too high or too [639] low?

Mr. Jordan: Are you qualifying Mr. Moores as an expert on values?

Mr. Ferguson: He is in the position of an

(Testimony of Charles B. Moores.)

owner. You understand that any owner may testify as to the value of property.

Mr. Jordan: Yes, that is true.

A. I considered the valuation prior to that write-down was excessively high.

Q. Do you have any idea of what its valuation was, if any, prior to this write-down?

A. I believe it was \$724,000.

Q. Do you know what it was subsequent to the write-down?

A. In the neighborhood of \$350,000.

Q. Did that, in your opinion, represent a write-down to a reasonable value of the plant?

A. I believe that represented the true value after the write-down—at the time of the write-down.

Q. Now, you referred to an appraisal made by Mr. Smiley—that was the appraisal, the transcript of which was read to the Court, having been made before Judge Beasley, is that correct?

A. I believe it was before Judge Wyman.

Q. I think you stand corrected. It was before Judge Beasley, made in October, 1935. Is that correct?

A. Yes, that was it.

Q. Do you know when the plant assets were written down?

A. In December, 1935.

Q. That was before the plan of reorganization was acted upon and confirmed?

A. It was.

Mr. Ferguson: In that connection, if your Honor please, and so that we won't jump backward and forward, I should like to refer to the fact

(Testimony of Charles B. Moores.)

that in evidence there are also other matters relating to this write-down, or in connection with the book value of the assets of the Sunnyvale plant and property. [640] These are in evidence, and I might as well call attention of the court to them at one time. I am referring to page 3 of the plan of reorganization, under the heading

“4. Assets:

“There is no physical inventory of the assets of the debtor corporation as of July 31, 1935.”

That was the date of the plan which was submitted.

“The items under the heading ‘Inventories’ therefore reflect only their book cost; and the items under ‘Capital Assets’ are stated at their book values, which are subject to a substantial write-down because of excess capital charges made, and insufficient depreciation and amortization taken, in prior years.”

I also desire to refer, if your Honor please, to Receivers’ Exhibit No. B, which was the Bourne report rendered to the company of the assets preceding the adoption of the plan. Under the heading of “Capital Assets” we have this:

“Following is a condensed summary of the other Capital Assets from February 28, 1907, to March 27, 1934.”

Then follows a summary, the reading of which I will omit. Then there follows:

(Testimony of Charles B. Moores.)

“The Capital Assets have never been appraised or properly depreciated and their stated value is considered to be considerably in excess of their true value.”

Q. Now, to go back to one further thing, Mr. Moores, when you referred to the sum of \$350,000 as representing, in your opinion, the correct or reasonable value of the plant following the write-down, do you mean as a going concern, or its liquidating value? A. As a going concern.

Q. Would its liquidating value be greater or less? A. It would have been less.

Q. Now, you are familiar, I understand, with the Forbes audit [641] and account, and Bourne audit and account? A. I am.

Q. Which are in evidence? A. Yes.

Q. Have you prepared or had prepared for you a schedule or a statement taken from those reports for the purpose of summarization of the net profit of the company during the period from June 30, 1936 to November 15, 1940, both before and after depreciation, net income during that period, and the net worth year by year?

A. From the Forbes reports?

Q. Yes, from the Forbes reports. I believe in one connection, that is as to the net worth figure of September 30, 1940, it is from the pro forma sheet that is in evidence as Respondents' Exhibit C. A. Yes.

(Testimony of Charles B. Moores.)

Mr. Jordan: Do I understand that Mr. Moores prepared this summary?

Mr. Ferguson: No, that is not correct. It was prepared pursuant to your direction, was it, Mr. Moores? A. Yes.

Mr. Ferguson: These figures, for the Court's information, and for Mr. Jordan's information, can be verified from the reports.

Mr. Jordan: Will the gentleman who prepared this personally be in court as a witness?

Mr. Ferguson: I will say this, that statement was prepared pursuant to Mr. Moores' direction, and it will be verified and checked by Mr. Knott, of Forbes & Company, who has done that. As a matter of fact, I checked it with him this morning, but if you wish he can check it again. All of these figures may be found in the reports, themselves.

Mr. Jordan: As to the statement, I have no objection, but in our case Mr. Gane was here and was subjected to cross-examination, and I think that in all fairness that we should have an opportunity [642] before this is introduced in evidence and becomes a part of the record to cross-examine him.

The Court: Let it be marked for identification.

(The summarization was marked "Respondents' Exhibit F for Identification.")

Mr. Ferguson: Q. Referring to Respondents' Exhibit F For Identification, Mr. Moores——

(Testimony of Charles B. Moores.)

Mr. Jordan: I am going to object, your Honor, at this time to the interrogation of this witness with respect to this exhibit which has only been marked For Identification, and which I understand will be later explained.

The Court: You will have full opportunity to cross-examine the man who made it. Now, it seems to me that we ought not to require this witness to step off the stand and have another witness put on so that you may have the opportunity to examine him now.

Mr. Jordan: Very well, your Honor.

Mr. Ferguson: I might further add, all of these figures are now in evidence.

The Court: Proceed.

Mr. Ferguson: Referring to Respondents' Exhibit F For Identification, Mr. Moores, under the heading, "Net Profit from Operations"—there are two columns, one before depreciation and the other after depreciation. Where were those figures taken from?

A. They were taken from a report of John Forbes & Company, certified public accountants.

Q. The annual reports which are in evidence?

A. The annual reports, and there was one interim report as of November 15, 1940.

Q. I notice that for the period from March 24, 1936 to June 30, 1936, there are no figures. Why is that?

(Testimony of Charles B. Moores.)

A. Because there are [643] no figures available for that definite period. The last available statement prior to June 30 is for the month of March—March 31, 1935.

Q. So they are not included? A. Yes.

Q. Although they do show a profit you have excluded those because no precise figures were available? A. That is right.

Q. I notice the item, "Net income." Do I understand correctly that these net income figures are taken after depreciation and interest deductions, but do not include profits to the company arising from reductions in liabilities, profits on sale of plant or miscellaneous minor surplus charges or credits? A. That is true.

Q. The figures under the column "Net Worth" were taken from where?

A. They were taken after all of this adjustment for reduction in liabilities and certain adjustments in minor amounts.

Q. In other words, this represents a summary as shown by Forbes & Co.'s annual reports, with one exception? A. Yes.

Q. And that is the September 30, 1940 figure which was taken from the pro forma balance sheet?

A. Yes.

Mr. Ferguson: If your Honor please, I offer this in evidence. It was made under this man's direction from the figures in evidence. These figures

(Testimony of Charles B. Moores.)

are presented in this form solely for the Court's convenience. This constitutes nothing but a summary of those figures, so that counsel would not have to go through the reports to arrive at that figure.

Mr. Jordan: May I make this suggestion, I am not an accountant, but I would like Mr. Gane to review these figures, and may I renew my objection at this time until we have an opportunity to do so? If they reconcile with his figures and his version of the reports then we would have no objection.

[644]

The Court: Let him examine them. I suppose you can do that between now and this afternoon.

Mr. Jordan: Oh, yes, I am quite sure he can.

Mr. Ferguson: Then on the same theory I present a summarization taken of the balance due on long term reorganization notes, that is the balance due after reduction from June 30, 1936 to December 31, 1940. This was made pursuant to your direction, Mr. Moores? A. Yes.

The Court: Let it be marked for identification.

(The schedule was marked "Respondents' Exhibit G For Identification.")

The Witness: Yes, this was made pursuant to my instructions.

Mr. Ferguson: Q. Submitted to you, do you mean?

A. It was submitted to me by you in conjunc-

(Testimony of Charles B. Moores.)

tion with Mr. Knott, of John Forbes & Company's office.

Q. The figures were taken from the books of the company, is that correct?

A. They were taken from the Forbes reports.

Q. Mr. Moores, referring to Respondents' Exhibit F For Identification, there is a column showing the net worth as suggested from time to time, and have you had, pursuant to your directions, a chart made reflecting pictorially those figures?

A. I have.

Q. You refer to this chart? A. Yes.

Q. And this is the chart? A. That is it.

Q. Those are the same figures referred to in Exhibit F For Identification? A. Yes.

Mr. Ferguson: Of course, I do not know whether Mr. Gane would prove or disprove this.

The Court: I understand that. I think it would be proper that Mr. Jordan's expert be allowed to examine the figures. [645] and tell him what he thought about it before he withdrew his objection.

Mr. Ferguson: That being the case, I will offer this pictorial representation also for identification.

The Court: It may be marked For Identification.

(The chart was marked "Respondents' Exhibit H For Identification.")

Mr. Ferguson: Q. Mr. Moores——

The Court: What is this?

Mr. Ferguson: A pictorial representation, it is

(Testimony of Charles B. Moores.)

a graph, a pictorial representation of the net worth of the company on the date of each annual report, and the figures of which are contained in Respondents' Exhibit F for Identification.

The Court: Who made it?

Mr. Ferguson: It was made pursuant to Mr. Moores' direction. I made it, myself, as a matter of fact.

The Court: It is a nice piece of work.

Mr. Jordan: I think so, myself. He is a good draftsman.

Mr. Ferguson: Q. With respect to Respondents' Exhibit G for Identification, showing the balance due as it existed from time to time, you have also had a pictorial representation or graph made of that? A. Of the indebtedness, yes.

Q. Showing the balance of principal due from time to time, and the balance of principal plus accrued interest from time to time?

A. Yes, both are shown.

Q. And this is that graph? A. Yes.

Mr. Ferguson: I will ask that this be marked as Respondents' Exhibit I for Identification, if your Honor please.

The Court: It may be marked.

(The chart was marked "Respondents' Exhibit I for Iden- [646] tification.")

Mr. Ferguson: Q. Now, Mr. Moores, turning to the sale of the property, the minutes were referred to and read in evidence, that is, portions of

(Testimony of Charles B. Moores.)

the minutes of the directors meeting of November 4, 1940, that related to the approval of the option by the Board of Directors and the issuance of the option. Was the option approved and the sale approved by the stockholders of this company?

A. It was approved by the stockholders of record, yes.

Q. That was done at the stockholders meeting held November 15, 1940? A. It was.

Mr. Ferguson: If your Honor please, I desire to present a matter to the Court that has not been brought to the attention of the Court. Mr. Jordan has referred to the fact that at this stockholders meeting that "The following voting trustees, being a majority of the voting trustees entitled to vote all of the outstanding stock of The Joshua Hendy Iron Works, a corporation, were present: A. J. Mayman, W. R. Bassick, and Ernest H. Price. The following voting trustees were absent: A. E. Webber and C. S. Moores. Mr. W. R. Bassick was appointed and acted as chairman of the meeting." Mr. Jordan has referred to that portion of it which recited that at a meeting of the board of directors held on November 4, 1940, the following resolution had been adopted, setting forth the resolution in full, and setting forth that an option had been granted to MacDonald and Kahn. I desire to continue reading from that point, after setting forth the directors' resolution in full:

"And that pursuant thereto the Joshua

(Testimony of Charles B. Moores.)

Hendy Iron Works had executed said option and received the consideration therefor.”

That would be \$10,000. [647]

“The Chairman further stated that since the voting trustees were the persons entitled to exercise more than a majority, to wit, all of the voting power of the outstanding capital stock of The Joshua Hendy Iron Works, it was in order for them to either approve or disapprove said option and the sale of substantially all of the property and assets of the corporation therein, and by said directors’ resolution adopted and approved.

“The chairman further reported that on November 13, 1940, Mr. A. J. Mayman, as Secretary, and on behalf of the voting trustees, had addressed the following communication to all of the holders of voting trustees certificates, fully advising them with respect to such action of the board of directors and to the proposed approval thereof by the voting trustees.”

Then follows a communication which had been addressed by the Secretary to all of the holders of beneficial interests, that is, all of the old stockholders of the company.

“November 13, 1940. To the Holders of Trustees’ Certificates issued by the Voting Trustees under the Plan of Reorganization of

(Testimony of Charles B. Moores.)

Joshua Hendy Iron Works confirmed by the U. S. District Court, Northern District of California, Southern Division, on March 24, 1936.

“On November 4, 1940, the Joshua Hendy Iron Works granted an option to MacDonald & Kahn, Inc. for the sale of its Sunnyvale plant and equipment, excluding cash and accounts and notes receivable, for the sum of approximately \$426,000—the exact amount of the consideration being dependent upon the inventory on hand at the date of sale. It is now apparent that MacDonald & Kahn, Inc. will exercise their option on November 15, 1940, and will, subject to the usual conditions incident to such sale, deposit the purchase price on that date. The directors [648] of the company have estimated that the proceeds of such sale, together with the cash and accounts and notes receivable of the company, will be sufficient to not only pay off all of the outstanding obligations of the company, but also enable the company to pay liquidating dividends to its shareholders aggregating approximately \$50 per share.

“Under the terms of the confirmed plan of reorganization and the voting trust therein provided for, the voting trustees, are, of course, empowered to vote all of the stock of the company. Since it is obvious to us that the proposed sale will be to the advantage of the company,

(Testimony of Charles B. Moores.)

and after payment of all its debts, will result in a very substantial realization by its stockholders, we, as voting trustees, propose to vote the stock in ratification of such sale already approved by the directors of the company. In order that you may be fully advised in the matter, however, we are taking this means of acquainting you with the situation; and should you have any question with regard to the matter we shall be pleased to discuss the same with you.

Very truly yours,

THE VOTING TRUSTEES
UNDER THE AFORESAID
PLAN OF REORGANIZA-
TION

By A. J. MAYMAN,
Secretary."

Then at the same meeting, if your Honor please, following there is a resolution adopted by the stockholders approving the plan of sale and execution of the option of sale.

Q. Mr. Moores, following the mailing of the notice by the voting trustees that they were going to vote the stock in confirmation of the option and the sale were any objections received from any of the old stockholders then holding beneficial interest certificates?

A. I heard no objection from anybody. [649]

(Testimony of Charles B. Moores.)

Q. Do you know of any objections that were made?

A. No, they expressed themselves as approving, with the exception of Mrs. Shores, that was sometime later—Mr. Gardner and Mr. Al Behneman, and Mrs. Shattuck—

Mr. Jordan: Your Honor, I think this is all hearsay as to what some of these stockholders may have told Mr. Moores.

Mr. Ferguson: If your Honor please, there has been a contention or an intimation that this sale was not properly made, and we desire to show that before the voting trustees approved the sale they communicated with all outstanding holders of trustees' certificates, and no objections were received. We think that that is very important, if your Honor please.

The Court: It seems to me in a case of this kind that there will be hearsay. We have had a lot of hearsay in this case—

Mr. Jordan: I will withdraw the objection.

Mr. Ferguson: Now, I understand from you that the option was exercised on November 15, 1940, is that correct? A. That is correct.

Q. From the standpoint of the business, the operation of the business, the operation of the plant by the Hendy Realization Company ceased as of noon of that day, November 15, 1940?

A. Yes, it did.

Q. And any subsequent transactions or opera-

(Testimony of Charles B. Moores.)

tions of the plant were by the purchaser and not by the company here before the Court?

A. That is true.

Q. And subsequent management of this corporation was by a board of directors and the officers who had formerly operated the plant had nothing further to do with respect to the action taken by the board of directors, is that correct? A. Yes.

Q. The subsequent management of the Hendy Realization Company [650] following noon of November 15, 1940 was by whom?

A. It was by the same board of directors and the same officers up until March 17, 1941, at which time a new set of directors and new set of officers were elected. Some were the same officers and some were different. I am the only member on the board that was on the board prior to March 17, 1941.

Mr. Ferguson: If your Honor please, in connection with the distribution of stock Mr. Jordan referred to and read to the Court some of the minutes of the directors meetings held December 4, 1940, with respect to that distribution, and I called your Honor's attention at that time to the fact that that was an adjourned meeting that was held and that there had been a discussion prior to that from which it had been adjourned. Mr. Jordan did not present that other matter, and I desire to present that other matter to the Court to complete the picture of the deliberations had by the board of directors.

(Testimony of Charles B. Moores.)

Mr. Jordan: As far as any conversation is referred to, Mr. Ferguson, I have no objection, but I would object, of course, to any self-serving declarations.

Mr. Ferguson: This is merely the minutes. This is a record of the minutes of the board of directors, what was actually done in connection with the distribution of the stock.

The Court: If there is any objection, Mr. Jordan you may make them later on in connection with the motion to strike.

Mr. Jordan: What I have in mind is, for example, I notice they refer to the company having been rehabilitated; that is a self-serving declaration; that is the thing your Honor is to decide and I do not want to be bound by it, and I would object to the reading of any material of that kind in a meeting of this sort.

The Court: I think if there is a statement in these minutes [651] such as suggested by Mr. Jordan, it is open to objection.

Mr. Ferguson: I will say in this regard that under the plan of reorganization the question of rehabilitation is necessarily in the discretion of the board of directors, and if they determined in their opinion it was rehabilitated, it is a good indication to the Court that is what was done.

The Court: As long as it is understood that any such statement contained in the minutes is not bind-

(Testimony of Charles B. Moores.)

ing upon the Court, that will satisfy Mr. Jordan's objection.

Mr. Jordan: I think it will entirely, your Honor. That is the very thing I have in mind.

Mr. Ferguson: This is the meeting of December 2, 1940.

"Director C. B. Moores then called the following facts to the attention of the board of directors:

"(1) That certain of the officers and employees of the corporation have, since its reorganization, rendered extremely valuable services to the corporation, resulting in its rehabilitation as a sound and going business, and the improvement of the financial condition of the company from a point where the stockholders of the company had little or no equity, as evidenced by the records of the reorganization of the corporation under Section 77B of the Bankruptcy Act, to a point where the equity of the stockholders has become very substantial;

"(2) That it was this rehabilitation of the corporation's business, so occasioned, which made possible the advantageous sale of the Sunnyvale plant and properties of the corporation, just consummated.

"(3) That notwithstanding the value of such services to the corporation, the compensation of such officers and employees has not been

(Testimony of Charles B. Moores.)

commensurate therewith; and that the board, through its [652] directors, has repeatedly represented to such officers and employees that the compensation received by them during said period would be supplemented by additional payment therefor as soon as, in the opinion of the board, such further payment was practicable and expedient;

“(4) That, in addition, due to the sale of the corporation’s Sunnyvale plant and properties, the employment of said officers and employees has necessarily been abruptly severed and their vacation and other rights interfered with;

“And he suggested that, since the affairs and position of the corporation now warranted the board’s action in such connection, the board consider the proper payment and reward of such officers and employees on account of their said services and in relation to their respective contributions to the restoration of the corporation. This being the consensus of the meeting, an extended and detailed discussion upon the matter was thereupon had, all directors participating, in an effort to work out a definitive plan for such payment commensurate with the best interests of the corporation and the fair and proportionate payment and reward of such officers and employees. Various tentative proposals in this regard were made and considered,

(Testimony of Charles B. Moores.)

and thereupon, and upon motion duly made, seconded, and unanimously carried, the meeting was duly adjourned to Wednesday, December 4, 1940, at 11:00 o'clock a. m., in order that the directors should have an opportunity to further consider and weigh said proposals prior to, and so as to enable, matured and final action thereupon.

“There being no further business, the meeting adjourned to Wednesday, December 4, 1940, at 11:00 o'clock a. m., in accordance with the foregoing motion.”

Mr. Jordan: When did you say that meeting was—December [653] 2?

Mr. Ferguson: Yes, two days before the meeting of December 4 was held, at which time, from the minutes Mr. Jordan has already read into the record, the cash distribution, aggregating some \$102,000 to a considerable number of the employees of the corporation was authorized. That resolution was read into the record.

Q. Now, you heard Mr. Jordan read the subsequent resolution into the record regarding the payment of those amounts? A. I did.

Q. Will you tell us whether there were any other considerations other than those recited in the resolution which prompted the board in its deliberations with respect to the making of these cash distributions?

(Testimony of Charles B. Moores.)

A. You mean reasons in the mind of the board?

Q. The reasons they had for making this cash distribution.

A. The reason was that the corporation had ceased business and was contemplating dissolution; that if each of those employees who might be entitled to receive stock, in the opinion of the board, were to have stock distributed to him it would require a rather involved complication, and when we got through, after they received the stock they would have to participate in the liquidating dividends, and the proceeding was determined to adjust the compensation to approximately the amount which they would have received as liquidating dividends on the stock. There were three principal employees who received part of their compensation in cash and part in stock. The cash compensation paid to them was adjusted to the amount of stock that would be distributed among them.

Q. That is, do I correctly understand that one of the considerations was the number of shares of stock that they would receive by [654] way of distribution?

A. Yes, one might have received three and somebody else five, somebody else fifteen, and somebody else a hundred.

Q. Now, turning to the second consideration which you mentioned, that was the fact that if the stock were distributed first, and then the distribution would be made, and I think you referred to

(Testimony of Charles B. Moores.)

it yesterday, that you felt that the distribution each person would receive in stock or cash distribution, as liquidating dividend, they were substantially the same?

A. Substantially the same amount, except there would be more by reason of the fact that there *would be more by reason of the fact that there* was a tax payment involved that amounted to a considerable amount per share on the stock outstanding for the holders of the beneficial or voting trust certificates and those who would receive stock under the plan of distribution.

Q. That is, if this might have been paid by stock it would have constituted a tax off-set as against the distribution of cash by way of liquidating dividends, is that correct?

A. Yes, it amounted to something in the neighborhood of \$30,000.

Q. Returning now to the distribution of stock, I believe the resolution referred to the fact that the stock was distributed to Mr. Bassick, Mr. Hyland, and Mr. Levit, only upon their first executing a waiver of right to participate in the first liquidating dividends? A. That is true.

Mr. Ferguson: If your Honor please, these waivers appear in the minute book following the meeting at which the distribution of stock was made. They are identical in wording, save in so far as they refer to the number of shares distributed to each man, and I would like to read one, and it

(Testimony of Charles B. Moores.)

may be deemed the others are the same except in name and amount. [655]

“For and in consideration of the distribution, transfer, and assignment to the undersigned of 812 $\frac{1}{2}$ shares of the capital stock of Hendy Realization Co., a California corporation (formerly The Joshua Hendy Iron Works), receipt whereof by the undersigned is hereby acknowledged, the undersigned does for himself, his heirs, successors and assigns, expressly waive any and all right to receive any dividends or distribution upon said stock out of the first \$85,848.75 available for dividends or distribution upon the capital stock of Hendy Realization Co., in dissolution or otherwise, so that said sum of \$85,848.75 may be pro rated and paid by way of dividends, distribution or otherwise (or set aside for such payment) only to the holders of the remaining 1907 $\frac{3}{4}$ shares of the outstanding stock of Hendy Realization Co., on this date held by voting trustees under and pursuant to the terms of the confirmed plan of reorganization of said corporation and the voting trust certificates issued pursuant thereto. The undersigned does not waive his right to participate in dividends or distributions upon the capital stock of this corporation made in excess of said sum of \$85,848.75, as aforesaid.

“This waiver shall be delivered to Hendy

(Testimony of Charles B. Moores.)

Realization Co. and filed with said corporation.

“Dated at San Francisco, California, December 20, 1940.”

That was signed by W. R. Bassick. There were 700 shares distributed to Mr. Levit, and 700 to Mr. Hyland.

Q. So that the distribution of the first liquidating dividend of \$45 per share which was made to the old stockholders of the company was not participated in by the three directors who had been distributed this stock pursuant to the plan, is that correct?

A. That stock did not benefit by that distribution. [656]

Q. And the reason it did not benefit was because of this waiver procured in connection with the cash distribution of this amount of \$85,000 in the aggregate?

A. That is true.

Q. I notice it has been referred to, in the course of the proceedings, that during some prior years amounts of money had been paid in various years to Mr. Bassick, Mr. Hyland, or Mr. Levit, or some of them, over and above the amount of salary. Will you explain what those were?

A. They were interim bonuses pending the time when the company would be in a cash position so that it could afford to pay salaries commensurate with their duties, abilities and responsibilities. They were trifling in amount.

(Testimony of Charles B. Moores.)

The Court: What do you mean by "trifling"?

A. I think the greatest amount paid to anyone at any one time was \$2000 additional compensation for a year's time. It did not result in a compensation which was anywhere near adequate.

Mr. Ferguson: Q. I understood the testimony the other day on Mr. Jordan's examination to be that your estimate of the amount possibly available for further liquidating damages to be approximately \$45,000 upon all of the remaining assets: is that correct?

A. \$45,000 less whatever expenses there may be for taxes and maintenance of remaining assets of the company.

Q. We will make a nominal reduction for that. Would it be fair to say that you would anticipate on the outstanding stock approximately \$10 per share more might be paid?

Mr. Jordan: This is your witness, and you have been leading, and I have not made any objection. Why don't you ask a question?

Mr. Ferguson: I thought it was apparent.

Q. Mr. Moores, what would you anticipate the outstanding stockholders might receive?

A. If the remaining property could be sold for \$45,000 there should be \$45,000 available for further [657] distribution. If it is sold for less than that, any distribution will be somewhat less; it will amount to approximately \$10 a share.

Q. Subsequent to November 15, 1940, the cash

(Testimony of Charles B. Moores.)

distribution to stockholders Bassick, Hyland and Levit was \$80,000? A. \$80,000.

Q. And as testified, the other stockholders \$85,-848.75?

A. Yes. Some of the total of \$85,000 is not delivered. One particular stockholder has not been able to discover her stock, and her dividend is awaiting her.

Q. The check has been issued and it is merely awaiting delivery? A. Yes.

Q. So that on the outstanding remaining estimated amount of \$10 a share to be delivered upon the new outstanding stock, there would be delivered to stockholders Bassick, Hyland and Levit the further sum of \$22,125, and to the other stockholders \$19,077.50, is that correct? A. Yes.

Q. Now, have you, for the purpose of illustration, had a schedule prepared which shows these amounts to which you have testified and the total amount that each would receive?

A. Yes, this is a schedule, or copy of it.

Q. That shows that the cash distribution subsequent to November 15, 1940, plus the estimated amount of future liquidating dividends to stockholders Bassick, Levit and Hyland, would be \$102,-125? A. That is correct.

Q. And to the other stockholders would be \$104,-926.25? A. That is correct.

Q. Or a relation of 49.32 per cent. to stockholders Bassick, Hyland and Levit, and 50.68 per cent. to the other stockholders?

(Testimony of Charles B. Moores.)

A. That is right. [658]

Q. I notice a note upon this tabulation as follows: "The foregoing amounts are distributions made and estimated distribution to be made by the company subsequent to the sale of its Sunnyvale plant November 15, 1940. Prior compensation paid to Bassick, Hyland and Levit on account of their services for the period March 24, 1936 to November 15, 1940, are not included, because they were payments on account of services currently rendered and as such were charged as current operating expenses of the business."

A. That statement is true.

Mr. Ferguson: I offer this in evidence as Respondents' Exhibit next in order, if your Honor please.

Mr. Jordan: No objection.

The Court: It may be admitted and marked.

(The Schedule was marked "Respondents' Exhibit J.")

Mr. Ferguson: Q. Was the sale of the Sunnyvale plant on November 15, 1940, a sale of the plant as a going concern, or as in liquidation?

A. It did not include good will, it was not a sale as a going concern, it was a sale of the facilities that were there.

Q. The operating facilities that were in operation?

A. That were in operation, yes.

Mr. Ferguson: If the Court please, subject to

(Testimony of Charles B. Moores.)

making my offer in evidence of the four exhibits marked for identification I am through with Mr. Moores at this time. Do you wish to cross-examine Mr. Moores now?

Mr. Jordan: Yes.

Cross-Examination

Mr. Jordan: Q. Mr. Moores, did I understand you to say just a moment ago that the plant was not sold as a going concern?

A. The plant was sold as a going concern. I may have given a [659] wrong impression in my answer. What I meant to say was that the business was not sold as a going concern. They did not buy the accounts receivable, they did not buy the good will of the business, they did not take over the accounts of the concern.

Q. What was the value of the good will carried on the books?

A. There was no value. Mr. Kahn said he would not give a nickel for it.

Q. But the sale did not include the continuance of the use of the name Joshua Hendy Iron Works?

A. The use of the name, it did not.

Q. And necessitated a change to the Hendy Realization Company, didn't it? A. Yes.

Q. And the purchaser, very shortly after the date of the sale, formed a Nevada corporation and adopted that name, and is using it to-day, isn't that true? A. Yes.

(Testimony of Charles B. Moores.)

Q. The plant never did shut down, to your knowledge?

A. There might have been a matter of a few days for inventory, that was all.

Q. And there was a certain amount of work in progress that was continued and completed by the purchaser?

A. That is true.

Q. Under the terms of the sale adjustments were to be made for concluding these jobs?

A. Yes.

Q. A great many of the old plant's employees that were under the old regime were retained on as employees of the company, isn't that correct?

A. Practically all of them are, as far as I know.

Q. That would include, as far as you know, substantially all of those seventeen employees that participated in the bonus distribution in December, 1940, to the extent of approximately \$23,000?

A. I have no knowledge except as to one or two or those. [660] I don't know whether the others are still there.

Q. Now, you testified as to your opinion regarding the value of the plant prior to the confirmation of the plan. You feel qualified to give an opinion as to the value of the plant as a going concern at that time, do you?

A. Yes, I do.

Q. How many acres of land are involved down there, do you know?

A. There are about 29 acres of land, altogether.

Q. How many buildings are there on that land?

(Testimony of Charles B. Moores.)

A. I have not any idea how many are there now. There were about five buildings there.

Q. Now, during your direct examination, Mr. Moores, Mr. Ferguson read into the record a letter addressed to the holders of trustees' certificates issued by the voting trustees under the plan of reorganization of The Joshua Hendy Iron Works dated November 13, 1940; that, incidentally, forms part of Plaintiff's Exhibit No. 6. Now, in that letter the holders of the trustees' certificates, in other words the old stockholders were notified of the impending sale of the plant, is that correct?

A. That is true.

Q. That is dated November 13, 1940?

A. Yes.

Q. As a matter of fact, on November 4, 1940, the board of directors of the company had given to MacDonald & Kahn a firm option for the purchase of that property, and had received a consideration of \$10,000, had it not? A. Yes.

Q. Thereafter the necessary steps to sell the property if the purchaser and holder of the option wanted to buy had been taken some nine days before this letter, that is right?

A. That is true, I presume that letter had gone out on that day. I was not in San Francisco at the time. I left on election day, I believe it was November 7, last year, and was gone for a matter [661] of ten days.

Q. You were present at the directors meeting on November 4?

(Testimony of Charles B. Moores.)

A. Yes, I was present at that time.

Q. When the resolution was adopted authorizing the execution of the option for a consideration?

A. Yes.

Q. Now, there was a stockholders meeting held on November 16, 1940? A. Yes.

Q. By the way, do you know whether this letter dated November 13, advising the old stockholders of the impending sale of the plant was mailed on the 13th?

A. I do not know. My supposition is that it was.

Q. In any event, you did know that on November 15, at 11:00 a. m., there was a stockholders meeting, at which time the granting of the option and the sale of the property was ratified?

A. I was not present at that meeting.

Q. Do you know of your own knowledge that that meeting took place?

A. I believe that the minutes of the meeting were adopted at a subsequent meeting of stockholders.

Q. You have not any knowledge of the date?

A. No, I have not.

Q. Well, the records introduced by Mr. Ferguson speak for themselves. All of the stock outstanding at that time of the company as far as voting power was concerned was vested in yourself, Mr. Mayman, Mr. Price, Mr. Webber, and Mr. Bassick?

A. Yes, that is true.

Q. So that although you were not present at this meeting of November 15 at 11:00 o'clock in

(Testimony of Charles B. Moores.)

the morning, a day and a half after you sent out this notification to the old stockholders regarding the sale—Mr. Webber was not present, as indicated by the minutes—Mr. Bassick, Mr. Price, and Mr. Mayman, according to the record, were there, and they were all voting trustees and [662] also directors, weren't they, at that time?

A. That is true, they were a majority of the voting trustees.

Q. So that on November 4, as directors, they proceeded to vote for the granting of the option, and on November 15, a day and a half after notification went out to the old stockholders, they ratified their act as directors by voting as voting trustees, is that correct?

A. That is correct, yes.

Q. And you were not there at the meeting, so you don't know whether anyone else was present. The option was actually exercised on November 15, 1940, was it not?

A. I presume it was.

Q. Of course, it had to be exercised before noon of that day or it would have expired.

A. The records indicate that it was exercised.

Q. Now, Mr. Moores, I am not going to read all of the minutes of the meeting of December 2 again, but a portion of the minutes of this meeting. The board of directors had a special meeting held on December 2, 1940, at 11:00 a. m., and certain remarks are attributed to you.

A. That is true.

Q. Apparently you made a little talk at that time and you said that certain of the officers and

(Testimony of Charles B. Moores.)

employees of the corporation have since its reorganization rendered extremely valuable services to to corporation, etc., and you said that it was this rehabilitation of the corporation's business, so occasioned, which made possible the advantageous sale of the Sunnyvale plant and properties of the corporation, just consummated. What did you mean by that?

A. That the business had been conducted as a going concern, had operated at a profit, had decreased the indebtedness substantially during the period of its operation, that the plant had a value that it would not have had if liquidated, that the stockholders out of the proceeds of this sale would receive [663] more money than had been taken out since 1906, and I don't know how many years prior, it had been a headache for most of the people that were involved in it.

Q. Including the Bank of California, which had been a creditor continuously since 1907?

A. That is true.

Q. Isn't it a fact that conditions generally were such that this property was more attractive and more subject to sale in November, or the fall of 1940, than it had been at any time prior from the date of the confirmation of the plan, on?

A. Apparently so, because that is the first substantial offer for the property that ever had been received. Had the property been sold at the same price ten years or five years previous, the proceeds

(Testimony of Charles B. Moores.)

of the sale would not have been sufficient to pay off the debts, much less pay the stockholders.

Q. There is not any question about it but what that plant at that time was and is now adapted to the handling of defense work?

A. I do not know that it is adapted to the handling of defense work. It was necessary for the new management to make an addition to the old plant and to build a new plant, spend about a million and a half dollars on the plant to make it adaptable for defense work.

Q. At least the potentialities were there, you will go that far, won't you, they did not have to build a new plant?

A. Yes, they did have to build a new plant. The main value of the plant to the purchasers, as was expressed to me by one of them, was there was a lot of second hand machinery in place which they could use.

Q. And are using to-day?

A. I presume they are, but not on the particular defense work which was in contemplation at the time, which was torpedo tubes and gun mounts. They had to spend one [664] million dollars for a new plant.

Q. You know of your own knowledge they are using that portion of the plant that was sold, that is, you understand there have been considerable improvements and additional plant, machinery, etc., but the plant that was sold in November of last

(Testimony of Charles B. Moores.)

year is being used presently on defense work, to your own knowledge?

A. A part of it is being used, different machines in the plant are being used for that, but from what I have been told, I don't know this of my own knowledge, if you want hearsay, they are working on a job for the Todd California Shipyards, on some marine engines for the British Government.

Q. And the foundry is certainly being used at the present time?

A. I have not been down there for several months, but when I was down there it was then contemplated it would be used as an iron foundry, not a steel foundry.

Q. Of course, the management had nothing to do with the creation of the defense program?

A. I hope not.

Q. Now, you also said, Mr. Moores, "That notwithstanding the value of such services to the corporation,"—you said—"that, in addition, due to the sale of the corporation's Sunnyvale plant and properties the employment of said officers and employees has necessarily been abruptly severed and their vacation and other rights interfered with." Was that a consideration in the mind of the board, generally, at the time that the stock was distributed and the cash was distributed?

A. This was particularly true as to Mr. Bassick, whose health was such that he could not hope to be employed after the cessation of this work.

(Testimony of Charles B. Moores.)

Q. I presume to perhaps a lesser degree it would affect Mr. Hyland and Mr. Levit?

A. Mr. Hyland has severed his connection with the successor company, as I understand, and Mr. Levit is [665] a man getting along in years; he put in 40-odd years with the company, and certainly is entitled to some consideration.

Q. The board did consider this as a fact?

A. It did.

Q. In the distribution of the stock, as well as the cash?

A. Yes.

Q. Now, you also said that in December the board wanted to give the management the stock but it would make a lot of calculation in so far as the distribution of the first liquidating dividend was concerned. Did you work out a system whereby you distributed cash that you considered the equivalent of the first liquidating dividend that would be payable on the stock which they were to receive and equalize it with the amount payable to the old stockholders. Is that your testimony?

A. That is true, but the major portion of that \$102,600 was paid to the management—with the exception of \$22,600. There were people included in the payment of \$102,600 who could not be considered part of the management entitled to this stock.

Q. As a matter of fact, the cash was voted, almost \$103,000?

A. \$102,600.

Q. Was voted to be paid on what date?

A. As soon thereafter as practical, I imagine, I don't know.

(Testimony of Charles B. Moores.)

Q. Do you remember?

A. It was to be paid sometime before the end of the year.

Q. It was December 4, was it not, when you voted the bonus?

A. I believe it was, yes, as soon as the cash condition of the company permitted.

Q. That is correct.

Mr. Ferguson: It was authorized that day, and I think it may be stipulated it went out in the next few days.

Mr. Jordan: It was paid.

Mr. Ferguson: Yes. [666]

Mr. Jordan: Q. The stock was not distributed, the 2212½ shares to Mr. Bassick, Mr. Hyland and Mr. Levit, until the 20th of December, 1940?

A. I think that was the date.

Q. In other words, the money was paid considerably before the stock was actually distributed?

A. Yes.

Q. Now, was it originally contemplated that other employees or officers of the company than Bassick, Hyland and Levit would receive a portion of this stock?

A. Yes, it had been. There were a number of the employees who had been considered.

Q. So that as it finally developed after the seventeen employees other than Bassick, Hyland and Levit received approximately \$23,000 in additional compensation in December, 1940, and Bassick, Hy-

(Testimony of Charles B. Moores.)

land and Levit received \$80,000 amongst them, they also got all of the stock?

A. Bassick, Hyland and Levit got 2212½ shares.

Q. And the other stockholders or the other employees received no part of it, is that correct?

A. That is correct.

Q. You said, and it is already in evidence, that bonuses were paid in varying amounts each year to Mr. Hyland, Mr. Levit and Mr. Bassick, in 1937 to 1941.

A. In different years. I think there might have been a year they were not, I do not recall exactly.

Q. There was not a year when there was not either a declaration of bonus or an increase in salary, was there?

A. To those three individuals?

Q. To those three.

A. I think their salaries, including all bonuses, were progressively more as time went on. There might have been one year when they received less than the previous year, but I do not recall that as a fact. The intention was to increase their compensation, if that is what you mean. [667]

Q. Now, I would like to go back with you to your testimony of yesterday. There is no question about it, is there, but what Mr. Bassick was made state receiver prior to the reorganization proceeding upon the death of Mr. F. J. Behneman, at the instance of the Bank of California, as the largest creditor of the company? A. That is true.

Q. Now, you had a conversation with Mr. Bassick in 1936 just before the plan was confirmed.

(Testimony of Charles B. Moores.)

A. Yes.

Q. And you said that if you were elected a director of the company you would consider that the stock should be distributed to those active in the management of the company in proportion to the rehabilitation accomplished.

A. That is true.

Q. But as I understand, at that time you did not discuss under what circumstances the stock should be distributed?

A. No decision was made as to the exact circumstances under which the stock would be distributed.

Q. You could not say at that time in what proportion the stock would be distributed, I think you put it, in advance of results?

A. The results were a prerequisite to any distribution of stock.

Q. At that time had you formulated any fixed idea as to what the results would have to be before the stock would be distributed?

A. Not definitely, no.

Q. Now, just to refresh your recollection on this, Mr. Moores, I will show you a letter of yours of July 12, 1938, addressed to Mr. Bassick.

A. Yes.

Q. You remember that? A. Yes.

Q. And in that letter you refer to a conversation of the day before, and you say, "As stated in our conversation of yesterday, it was contemplated that a five-year period would be necessary to dem-

(Testimony of Charles B. Moores.)

onstrate the success of the plan which can only be measured [668] by the amount of liquidation of indebtedness that has been accomplished at the end of that period. Further provision was made for an extension of five years if, in the opinion of the directors, sufficient progress had been made to warrant continuance of the business beyond that time. It was recognized that the success of this plan depended upon continuity and ability of management. Accordingly, those men in key positions who are willing to remain with the company until such time as the results of their management have demonstrated the success of the plan will be entitled to participate in the distribution proportionately as, in the opinion of the directors, they have contributed to such success. As pointed out to you in conversation yesterday, a transfer of the stock at this time would be an empty gesture, as it has no present value in view of the heavy indebtedness, and a value can only be established by reduction in that indebtedness.”

Those were your views on the matter of stock distribution at that time, were they?

A. Yes, they were.

Q. You were in favor of giving the plan a fair trial to work itself out by going through the whole five-year period?

A. Unless it would solve itself in some other way in the interim.

Q. On that day, July 12, 1938, you felt that the

(Testimony of Charles B. Moores.)

stock had no value? A. Less than no value.

Q. Less than no value?

A. Yes, exactly. There had been accumulated losses in the first three months of that year, and there would be no value of it until there had been a reduction in the indebtedness.

Q. Now, you had another conversation with Mr. Bassick in the end of 1939, or perhaps it might have been early 1940, because [669] you refer to the 1939 statement having been received. I do not imagine that would have been completed until after the first of the year; but in any event, at the end of 1939, Bassick had received extra compensation for that year, had he not? A. Partially, yes.

Q. Well, in your discussion it was indicated from the 1939 statement that the stock had acquired some value.

A. It indicated it had a value which theretofore it had lacked.

Q. Mr. Bassick then asked you if in view of those circumstances it was not time to distribute the stock, and as I understand it you said that the distribution of stock could not be made until the debtor obligations had been taken care of.

A. No, I did not make such a statement.

Q. Well, what did you tell him, then, when he told you he thought the stock should be distributed at that time?

A. Well, the plan contemplated the distribution of the stock, the whole or any part, when conditions

(Testimony of Charles B. Moores.)

justified it, but it was not expedient to do it because of the fact that the creditors still felt they had a major interest in the concern, and wanted control of it until more progress had been made in the reduction of the indebtedness.

Q. You recall that long letter of Mr. Bassick, I think it was dated April 8, 1940, to the board of directors.

Mr. Ferguson: March 18.

Mr. Jordan: Which had all of the figures and reports of conditions in it. I think you testified that you had a talk with him about the time that that letter was received by the board. A. Yes.

Q. And he again wanted additional monetary compensation and was told by you that the cash position of the company at that time [670] would not permit an increase in fixed salary, but you felt that it would be better to defer that matter until the end of that year, December being the usual time when additional compensation had been discussed.

A. That is true.

Q. I believe that you also pointed out at that time that so far as the distribution of stock was concerned that the first five-year period under the plan of reorganization would expire in March of this year and you thought it would be proper to defer any further discussion on stock distribution until that time. A. That is true.

Q. Then you had another talk in June or July, 1940, and Mr. Bassick at that time, I believe, pointed

(Testimony of Charles B. Moores.)

out to you that the big job had been completed successfully at considerable profit to the company, and that he wanted more monetary compensation, and he also inquired about the stock being distributed, and again you told him at that time, if my notes are correct, and you correct me if I am wrong, that it would be better to consider additional compensation at the end of the year, as usual, and that March 24, 1941, the end of the five-year extension period, would be the proper time to consider stock distribution.

A. It would be an expedient time to consider it.

Q. Now, bringing yourself again to the meeting of November 4 of 1940, when the granting of the option was voted, according to the minutes of that meeting you had considerable discussion about the stock distribution, and then it was indicated at least by the minutes that you decided to defer the matter, or further discussion on that subject, until after it was determined whether or not the option would be exercised? A. Yes.

Q. Did the board represent to Mr. Bassick at that meeting if the option was exercised that the stock would be distributed? [671]

A. It did, yes.

Q. Did the board at that time, in the alternative, promise Mr. Bassick that he would get the stock even if the option were not exercised?

A. No, no commitment was made of that sort, except that in general he eventually would receive

(Testimony of Charles B. Moores.)

compensation in the way of distribution of stock for the progress which had been made.

Q. Now, at that point, in November and December, 1940, the Albertie M. Hendy stock having been cancelled, the old stockholders had a beneficial interest in 1907 $\frac{3}{4}$ shares. Is that correct?

A. That is correct.

Q. That was in the voting trust? A. Yes.

Q. Being voted by the directors as voting trustees? A. Yes.

Q. And the directors were also holding 2212 $\frac{1}{2}$ shares which were subsequently distributed to Mr. Bassick, Mr. Hyland, and Mr. Levit after the sale of the plant? A. Yes.

Q. It follows, does it not, that had that stock been distributed to those gentlemen they would have been in control of the company? A. Yes.

Q. And that was something that the creditors did not want?

A. They did not want anybody in control of the company except the creditors.

Q. Until they were paid?

A. Not necessarily until they were paid, but until the five-year period had elapsed, or some method might have been devised to provide proper security for the creditors for which they might be willing to distribute the stock and turn the management over to the new men.

Q. I have forgotten now how long you said yes-

(Testimony of Charles B. Moores.)

terday that you had been connected with the Bank of California.

A. I was not asked that question. I was asked how long I had been cashier. [672]

Q. How long have you been with the bank?

A. Nearly twenty-four years.

Q. That would take you back to about World War Time? A. Yes.

Q. You were acquainted with the Hendy Company at that time, weren't you?

A. Well, I was slightly acquainted with it in 1918; you might say it probably started about 1920.

Q. It is a fact, is it not, that during the World War period, when this country got into the war, and during the post-war period, that the Joshua Hendy Iron Works was doing a tremendous amount of government work? A. I don't know that.

Q. You don't know that?

A. I could tell by referring to the records.

Q. I thought you might know that of your own knowledge.

A. I understood they had made some addition to the plant at that time to build some marine engines.

Q. The appraisal that was made during the re-organization proceedings of the plant, I believe Mr. Ferguson yesterday or the day before read some testimony from the record before Judge Wyman.

Mr. Ferguson: That was before Judge Beasley.

Mr. Jordan: For the purpose of my question it won't make any difference.

(Testimony of Charles B. Moores.)

Q. Was the appraisal made at that time used as a basis for the write-down on the plant that took place in December, 1935?

A. Yes, that appraisal was used as a basis with some adjustments.

Q. With some adjustments? A. Yes.

Q. Was that write-down upon that basis made at your suggestion or direction, or the bank's?

A. No, I do not believe it was. It was made when Mr. Bassick was trustee; presumably it was made at his instance.

Q. But you were constantly in communication with Mr. Bassick [673] during that proceeding?

A. Yes.

Q. Do you know, and if you do not know say so, whether or not the previous valuation before the write-down was based upon the costs?

A. The books did not indicate how it was arrived at. It was based on cost, but some years depreciation had been taken and other years none taken.

Mr. Jordan: I think that is all. Thank you, Mr. Moores.

Redirect Examination

Mr. Ferguson: If your Honor please, I have a few questions. Perhaps these are not proper cross-examination, and to that extent I make Mr. Moores my own witness again.

Q. Mr. Moores, did the directors receive anything in this distribution?

(Testimony of Charles B. Moores.)

A. We paid Mr. Bassick in his capacity as trustee.

Q. Did the directors, as such, receive any compensation?

A. We collected \$10 for attendance at each directors meeting.

Q. No other compensation? A. No.

Q. Did the Bank of California receive any distribution to them other than the payment of the debt which had been scaled down?

A. Nothing other than that.

Q. I notice that for the year ending December 31, 1938 there is a bay in this line of net worth of this company. I wonder if you can explain why that occurred, and whether there is any explanation in that regard that may be made?

A. We lost between \$19,000 and \$20,000 during that year.

Q. That shows upon the annual report?

A. Yes.

Q. Isn't it a fact that during the year that the loss shown upon the books may be explained by the fact that no account had been taken of work which had not been completed?

A. No profit had been taken on the work in progress, no profit was taken until deliveries were made. [674]

Q. In other words, the books were on a cash basis?

A. They were not on a cash basis, but as to work in progress they were.

(Testimony of Charles B. Moores.)

Q. On a cash basis? A. Yes.

Mr. Ferguson: I think that is all.

Mr. Jordan: No further questions.

Mr. Ferguson: If your Honor please, it is understood I may reserve my offer on these exhibits for identification.

The Court: Yes.

F. KNOTT,

called for Defendants and Pettitioners; sworn.

Mr. Ferguson: Q. Mr. Knott, what is your occupation? A. Public accountant.

Q. Are you a certified public accountant?

A. I am.

Q. By whom are you employed, if anyone?

A. John F. Forbes & Co.

Q. How long have you been so employed?

A. By John F. Forbes & Co.?

Q. Yes. A. About six years.

Q. How long have you been a certified public accountant? A. About four years.

Q. How long have you been engaged in accounting? A. About 22 years.

Q. Will you give us, briefly, a general background of what your experience has been?

A. Well, I was employed by Haskins & Sells for fifteen years, and then I joined Forbes & Company.

Q. Now, in the course of your employment by Forbes & Company have you had any occasion to

(Testimony of F. Knott.)

come in contact with the Forbes reports which are in evidence, that is, the reports for the period ending June 30, 1936, Plaintiff's Exhibit 3-A, December 31, 1936, 3-B, [675] December 31, 1937, 3-C, December 31, 1938, 3-D, December 31, 1939, 3-E, November 15, 1940 and December 31, 1940, 3-F. Have you had occasion to examine those reports?

A. I have.

Q. As a matter of fact, you worked on them, did you not? A. Yes, I did.

Q. With particular reference to these reports, do any of these annual reports, Plaintiff's Exhibits 3-A to 3-F contain a balance sheet as of March 24, 1936? A. They do not.

Q. What is the nearest balance sheet that they have as to that date? A. June 30, 1936.

Q. Do any of the reports in evidence show the amount of working capital of the company as of March 24, 1936?

A. They do not, to my knowledge.

Q. Do any of these reports show the amount upon the books of plant and other fixed assets as of March 24, 1936? A. No, they do not.

Q. Can you tell us from the reports what as of March 24, 1936, was the total amount of obligations, that is immediately before the reduction, and I hand you for your convenience some work sheets, and ask you if those work sheets were prepared by you? A. Yes, those were prepared by me.

(Testimony of F. Knott.)

Q. That was prepared from what figures, and on what basis?

A. From the reports of John F. Forbes & Company.

Q. Can you give us, then, the total amount of liabilities of the company, that is, the long term reorganization liabilities before reduction on March 24, 1936?

A. I do not think I understand the question.

Q. On March 24, 1936 there were outstanding before they had been reduced by the plan what amount of obligations of the company, inclusive of interest?

A. Yes, I understand. \$64,732.27. [676]

Q. Do your reports on the books of the company show what the balance of that obligation was after the reduction had been made?

A. Our report does.

Q. You have taken those figures for convenience in testifying here from reports, have you not?

A. Yes.

Q. What is that figure?

A. That is \$568,606.82.

Q. One moment; as of that date has there not been interest accruing on a tax difficulty so that the amount as of that date was slightly larger?

A. Yes, that is correct.

Q. That amount of interest was what?

A. I think it was \$1300.

Q. \$1352.90? A. That is correct.

(Testimony of F. Knott.)

Q. Making a total then as of March 24, 1936, of \$569,969.72? A. Correct.

Q. Now, this morning before court, Mr. Knott, I handed you certain tabulations or summaries of figures which were taken from the reports and asked you to verify those. Did you have an opportunity to do that? A. Yes, I did.

Q. Referring to Respondents' Exhibit F for Identification, I will ask you whether you have checked those figures against your reports—withdraw that. Your reports are, of course, taken from the books of the company, are they not?

A. Yes.

Q. And correctly reflect those book figures?

A. Yes.

Q. Subject to such notations as you made in your reports? A. That is right.

Q. Now, have you checked Respondents' Exhibit F For Identification, or a copy of that, against the annual reports for the period indicated,—for the period ending September 30, 1940, you have no annual report, and you are not testifying to that figure?

A. That is correct, outside of that the figures are a correct statement. [677]

Q. And your annual reports correctly show those figures as set forth in this exhibit? A. They do.

Q. Now, I will refer you to Respondents' Exhibit G for Identification and will ask you whether you had an opportunity to check those figures as against your reports which are in evidence.

(Testimony of F. Knott.)

A. Yes, I have checked those.

Q. With that exception, the figures outside of October 31, 1940, they were taken by you from your work papers from the books, themselves, were they not?

A. Yes.

Q. And are not contained in the reports, themselves?

A. Yes.

Q. Are those figures correct and in accordance with your report as taken from your reports?

A. They are, with that exception.

Q. And as to October 31, 1940, this sheet was prepared from reports and from your work sheets and the books of the company, was it not?

A. Yes, it was.

Q. On October 31, 1940 it shows the principal balance to be \$274,966.57.

A. It does.

Q. And it shows interest on that date of \$25,264.68?

A. Yes.

Q. That makes a total of \$300,231.25?

A. That is correct.

Mr. Ferguson: If your Honor please, I think that I have made sufficient proof, and I now offer these in evidence, that is, Respondents' Exhibits F, and G, together with Respondents' Exhibits H and I, all for Identification, which are taken from the same pages.

Mr. Jordan: No objection.

The Court: They may be admitted and marked.

(Respondents' Exhibits F, G, H, and I for Identification were received in evidence and

(Testimony of F. Knott.)

marked "Respondents' Exhibits F, G, H, and [678] I.")

The Court: We will continue the trial until 2:00 o'clock.

(A recess was here taken until 2:00 o'clock p.m.) [679]

Afternoon Session—2:00 o'Clock P.M.

Mr. Ferguson: If your Honor please, I should like to put on Mr. Moores for a few more questions before resuming with Mr. Knott.

The Court: Very well.

C. B. MOORES,

recalled.

Mr. Ferguson: Q. Mr. Moores, you testified, as I understand it, that you were familiar with the financial affairs of the Joshua Hendy Iron Works during the period involved. A. Yes.

Q. You are familiar with them on March 24, 1936? A. Yes.

Q. And on June 30, 1936? A. Yes.

Q. Was there any substantial difference in the financial condition of the company between those two dates?

A. Practically no change, a matter of a few thousand dollars at the most.

Mr. Ferguson: That is all.

Mr. Jordan: No questions.

F. KNOTT,

recalled;

Direct Examination
(Resumed)

Mr. Ferguson: Q. Mr. Knott, the reports to which you have referred have been offered in evidence. Have you prepared a summary schedule reflecting the financial condition of the Joshua Hendy Iron Works at March 24, 1936? A. No.

Q. What have you prepared by way of a schedule?

A. I have prepared a schedule as of June 30, 1936.

Q. May I have that, please? A. Yes.

Q. These figures are figures reflected in your report dated [680] June 30, 1936, as adjusted by your report of December 31, 1936?

A. That is correct.

Mr. Ferguson: If your Honor please, may I ask that this be marked as Respondents' Exhibit For Identification?

The Court: It may be marked.

(The document was marked "Respondents' Exhibit K, For Identification.")

Mr. Ferguson: Q. Will you explain what your summary of this shows, Mr. Knott?

A. This summary shows the net financial condition, or we might say the deficit of capital at June 30, 1936, of \$31,870.77.

Q. I notice as an approximation of the financial position at March 24, 1936, you have shown the

(Testimony of F. Knott.)

June 30, 1936 figure as representing that figure: Is that right? A. Yes.

Q. The working capital is \$218,514.05, and the subsequent figures represent amounts taken from the June and December reports, so as to reflect the condition on June 30, 1936, is that correct?

A. That is right.

Q. That shows a capital deficiency of \$31,870.77 as of that date, that is, excess of liabilities beyond assets in that amount? A. That is correct.

Mr. Ferguson: I offer this in evidence and ask that it be deemed read. I see no purpose in reading all the figures in evidence.

The Court: So ordered.

(The schedule entitled "Approximation of Financial Condition at March 24, 1936, using balance sheet in John F. Forbes & Co. report as of June 30, 1936 after adjustment shown on report as of December 31, 1936, was marked "Respondents' Exhibit K" in evidence.) [681]

Q. Now, from the Forbes & Company reports in evidence, to which we have referred, have you prepared a summarization of the changes in financial condition between June 30, 1936 and November 15, 1940? A. I have.

Q. May I have that? A. Yes.

Q. Will you explain what this is, please?

A. This is a statement of deficit at June 30, 1936 as shown by our report on August 4, 1936, which

{Testimony of F. Knott.)

covers an audit up to June 30, 1936 and showing the changes from that figure to the corresponding figure at November 15, 1940, that is, the deficit at that date.

Q. When, in the first line, you refer to "Deficit, per audit report dated August 4, 1936," that is for the period ending June 30, 1936, which is Plaintiff's Exhibit 3-A, is that correct?

A. That is correct, that is the report.

Q. So the deficit figure of \$504,287.36 shown in your report is the deficit figure as shown in your report on June 30, 1936?

A. That is right.

Q. And the final figure, Deficit November 15, 1940, of \$76,199.67 represents a comparable figure taken from your November 15, 1940 report in evidence: is that correct?

A. That is correct.

Q. Now, the summarization of those two, and reconciliation of those two represents the change in the financial condition during the period from July 1, 1936 to November 15, 1940?

A. It does.

Mr. Ferguson: If your Honor please, I offer this in evidence as Respondents' Exhibit L.

The Court: Admitted.

(The document was marked "Respondents' Exhibit L.")

Mr. Ferguson: Q. One further question by way of illustration, in your reference to the deficit as shown on the books, [682] does that mean that the par value of the capital stock is that much in excess

(Testimony of F. Knott.)

of the net worth of the company, or the net worth represents the difference between that deficit and the par value of the capital stock? A. Yes.

Mr. Ferguson: That is all.

Cross Examination

Mr. Jordan: Q. Mr. Knot, I believe that Mr. Moores requested you to prepare the answers to the interrogatories that were propounded in this matter by Dr. Behneman and Mrs. Shores?

A. No, not personally.

Q. Not personally? A. No.

Q. Were the answers to the interrogatories prepared under your supervision?

A. They were not.

Q. Who, in that firm, did that work?

A. I have no direct knowledge, but I believe it was one of their other accountants. If you wish his name, it is Mr. Thielmeyer.

Mr. Jordan: So that there may be no misunderstanding, I think the testimony was that most of the basic information was from the books, but I thought Mr. Moores said when he got the interrogatories he turned them over to the accountants and that they had prepared the answers.

Mr. Ferguson: They had prepared the information, I think that was the testimony. I think he testified that the answers were prepared in collaboration between Mr. Moores and myself on the basis of that information.

(Testimony of F. Knott.)

Mr. Jordan: Q. Have you ever seen these answers?

A. Yes, I have seen copies of them, that is the ones that we have.

Mr. Ferguson: You are not referring to the answers of interrogatories as filed?

A. No, the ones that we used.

Mr. Jordan: Q. I am going to show you the original sworn [683] answers to certain interrogatories that were propounded in this matter, sworn to by Mr. Moores, and I am going to particularly direct your attention to Answer 15, appearing on page 11, designated "Answer to Interrogatories No. 20 and 21." Before you read that answer perhaps in fairness to you I should read the question so that you can properly understand.

Mr. Ferguson: If your Honor please, we object to this line of inquiry as not proper cross-examination, not covering any phase of the examination upon which we had Mr. Knott testify, and, in the second place, this witness has furthermore stated he has never seen the answers to the interrogatories before.

The Court: I think the objection is good.

Mr. Jordan: What I was going to do was to ask Mr. Knott to compare the material contained in the answer with the reports which I understand he prepared, to first of all determine whether or not that answer is accurate or not. We have not had an

(Testimony of F. Knott.)

opportunity to examine the man who prepared the material which is set forth there.

The Court: I understand they were prepared by Mr. Ferguson in collaboration with Mr. Moores after the figures were given to him by the Certified Public Accountants.

Mr. Ferguson: That is correct.

Mr. Jordan: I understood Mr. Moores to testify when I interrogated him about the answers the other day that he had turned the interrogatories over to an accountant and he had prepared the answers which he signed.

The Court: My impression is the same as yours.

Mr. Jordan: In that regard I think he said that he turned the questions over to the certified public accountant but I don't know—it now appears that he did not. [684]

The Court: Oh, no. I don't know that he did what you say, that they prepared the answers, but now it appears from Mr. Ferguson's statement that is not what happened, and I take it what Mr. Ferguson says in that regard is true, because it seems to me to be what would naturally follow.

Mr. Jordan: I accept it as true. There is no question about that.

The Court: You probably would do the same thing under the same circumstances.

Mr. Jordan: I undoubtedly would.

The Court: Can you get the witness who made the investigation?

(Testimony of F. Knott.)

Mr. Ferguson: He is, unfortunately, in the Service, he is in the Navy.

The Court: I wonder if Mr. Moores could take the stand and give us some additional light upon this subject, or perhaps we might let down the bars and let Mr. Ferguson take the stand.

Mr. Jordan: Would you like to, Mr. Ferguson?

Mr. Ferguson: I do not profess to be much of an accountant.

Mr. Jordan: I think perhaps I can get at it this way. I am sure you are much better on it than I am.

The Court: As I understand you, you know nothing about these answers at all?

A. No, I merely have read the answers.

Q. You did not supply the figures contained in the answers? A. I did not.

Q. You did no work upon the answers to these interrogatories? A. None, whatever.

The Court: Do you want to put Mr. Moores on the stand again?

Mr. Jordan: If Mr. Moores thinks he can give me any help. As I understood his testimony the other day he did not know much [685] about the answers.

The Court: Do you want to amplify your testimony in that regard, Mr. Moores?

Mr. Moores: I think I can answer any question.

The Court: Would you please take the stand? You may step down, Mr. Knott.

C. B. MOORES,

Recalled for Further Cross-Examination.

Mr. Jordan: Q. Mr. Moores, before I show you these answers I am going to read you the interrogatories so that you will have the questions as well as the answers.

“Interrogatory No. 20: State the amounts of the net profits or losses of the Hendy Co. for the years 1937, 1938, 1939 and 1940, respectively.”

Interrogatory No. 21 reads:

“State the amounts of the non-operating income or losses of the Hendy Co. for the years 1937, 1938, 1939 and 1940 respectively.”

Now, I am going to show you the Answers to those interrogatories which was referred to as Answer No. 15 on page 11, and I am going to particularly call your attention to the figure which is included under the 1940 column here, which is indicated as net income, \$181,839.67. A. Yes.

Mr. Ferguson: You are putting the interrogatories and answers in evidence?

Mr. Jordan: Not in evidence, I am using them for the purpose of impeachment, which I am permitted to do.

The Court: Is there a question pending?

Mr. Jordan: I am waiting for Mr. Moores to refresh his recollection on that answer. [686]

Q. Are you familiar with the details set forth in the answer there?

(Testimony of C. B. Moores.)

A. What is the question?

Q. I am directing your attention to the item of \$181,839.67, referred to as net income for 1940.

A. Yes.

Q. You have also testified that you are familiar with these Forbes statements? A. Yes.

Q. I will ask you if you will reconcile that figure in the answer with the item referred to here as net loss in the December 31, 1940 report of Forbes & Company, Plaintiff's Exhibit 3-A, the net loss being referred to as \$80,690.43?

Mr. Ferguson: If your Honor please, I object to the question on the ground that there is no foundation that has been laid as showing that these are the same things. As a matter of fact, I pointed out when these reports were offered that in some cases the accountants might handle an item differently than that was, and I particularly pointed out this one item which is undoubtedly the figure involved in the cash distribution which was paid to the officers of \$102,729.76. Now, for accounting purposes, the accountants had to put it somewhere, and in our contemplation it is not properly a charge which should be taken from those figures, and there is no reason why they should coincide—there is no reason why the accountant's conclusion as to which column a charge or a credit should come in necessarily binds Mr. Moores in his answers as to whether it is a proper column.

(Testimony of C. B. Moores.)

The Court: It may be that you should have taken the witness stand instead of Mr. Moores.

Mr. Jordan: Q. Do you have any knowledge of this?

A. Yes, Mr. Jordan, I tried to reconcile that particular figure here of the net loss shown by this statement, particularly to [687] surplus charges and surplus credits as those two charges have been figured, and that figure brought no specific relationship, because there are adjustments subsequent to this figure in this report, and there are adjustments subsequent to that figure in your report, in the answer to the interrogatories.

Q. Let me ask you this: As I understand it this figure referred to as Net income for 1940, \$181,839.67, does that mean that the company made that amount of money during 1940?

A. Not from operations, no.

Q. From what did it make that amount of money?

A. It made part of it from the sale of the plant, and part of it from, I believe the profit on the sale of the plant.

Q. That would have been \$131,000?

A. Yes, in round figures.

Mr. Jordan: I think that is all I want from Mr. Moores.

F. KNOTT,

recalled;

Cross Examination
(resumed)

Mr. Jordan: Q. Mr. Knott, the Forbes report reflects a profit on the sale of the Sunnyvale plant of in round figures \$131,000. Was that profit a taxable profit? A. I don't know.

Q. What do you mean you don't know?

A. I have not investigated the report to be able to determine whether it is a taxable profit or not.

Would a profit arrived at under the circumstances that this \$131,000 was arrived at ordinarily be considered as a taxable profit for income tax purposes?

A. I am afraid I could not answer the question, I don't know what the situation is as far as taxable is concerned without investigating it and looking it up. In other words, I could not give you an off-hand opinion as to whether it is taxable or not. I am not familiar [688] enough with the picture there.

Q. Do I understand that you did the work on all of these Forbes reports?

A. I did not.

Q. They were not prepared under your supervision? A. Some of them were.

Q. You don't feel familiar enough, however, with the situation there where the plant was written down in book value so as to result in a profit upon the sale last November of \$131,000 to be able to tell us whether, in your opinion, that would or would not be a taxable profit?

(Testimony of F. Knott.)

A. I am afraid I could not answer that question.

Q. I am afraid maybe I did not make it very intelligible to you.

A. Yes, the question is intelligible, but I say I could not answer that question, because I have not the information upon it.

The Court: The question is clear. I think the witness said he did not know the situation well enough or have the facts before him so that he could answer it.

A. That is correct. It would be merely a matter of opinion which I could not substantiate without some other data.

Mr. Jordan: Q. I am going to show you Respondents' Exhibit F, Mr. Knott, and refer you particularly to the item of \$60,715.14, which appears under the heading "Net Income" as of November 15, 1940. Were all of the liabilities of the company considered in arriving at that profit in making up that statement?

A. All of the known liabilities were included, but this net income is subject to the note which is on the bottom of this statement.

Q. Would you read that note, please, for us?

A. "Note: Net income figures are taken after depreciation and interest deductions, but do not include profits to the company [689] arising from reductions in liabilities, profits on sale of plant, or miscellaneous minor surplus charges or credits."

(Testimony of F. Knott.)

Q. There are no other liabilities other than you have stated?

A. There may have been others; if you will refer to this other statement of the surplus you will find that we have a notation on the bottom of that which refers you to our report of November 15, Exhibit B, page 2.

Q. Would that be Respondents' Exhibit F?

A. I have not the number, that is the summary of financial condition.

Q. Yes.

Mr. Ferguson: No, I think it is Exhibit L.

Mr. Jordan: Q. Did the Hendy Company, if you know, make a tax return for 1940?

A. Well, I have no direct knowledge, but I assume that it would make a return. I have no direct knowledge of that, however.

Q. You had nothing to do with the preparation of such a return? A. No.

Q. Can you tell approximately from these reports what the current position of the Hendy Company was on the first of November, 1940 as to accounts receivable and cash?

A. No, we could only tell to November 15

Q. Only November 15?

A. Only November 15. The October figures were inserted, as Mr. Ferguson stated before when I answered the question, they were inserted by me as a memorandum.

Q. Let me ask you this: In view of your famil-

(Testimony of F. Knott.)

ilarity with the financial condition of this company, would you say that it would have been possible at a date immediately prior to the sale of the Sunnyvale plant for the company to have paid additional compensation or bonuses in the amount of approximately \$103,000?

Mr. Ferguson: Will you pardon me, do I understand that [690] question is directed to paying out the cash?

Mr. Jordan: In a condition to pay it.

Mr. Ferguson: Pay how much?

Mr. Jordan: \$103,000.

Mr. Ferguson: Cash or otherwise?

Mr. Jordan: Cash, that is what was paid on or about the 4th of December, 1940.

A. Will you restate that question? I do not quite get what you are getting at.

Q. I am afraid I do not state things very well, but be that as it may, what I am trying to find out is was the Hendy Company financially in a condition to pay out \$103,000, approximately, to various of its employees and officers immediately prior to the sale of the Sunnyvale plant, which would have been the early part of November, 1940; in other words, prior to November 15, of that year?

A. I would not know.

Q. You would not know that? A. No.

The Court: I was wondering how he could answer that question.

Mr. Jordan: Q. Would they have enough cash to pay?

(Testimony of F. Knott.)

A. In the first place, I don't know what cash they had without referring to the November 1 report, which is the one you referred to.

Q. The November 15.

A. In the second place, the possibilities of paying out money is dependent entirely upon business conditions.

The Court: Q. In the judgment of the directors, too?

A. In the judgment of the directors, too.

The Court: Mr. Ferguson, do you know how much money, how much cash the company had on hand at the time Mr. Jordan is inquiring about?

Mr. Ferguson: No, I do not, if your Honor please. As I [691] said when we introduced the September 31 balance sheet that was the closest balance sheet, pro forma sheet, that we had to the November 15 report. The November 15 report, of course, reflects any cash deposits as the proceeds of the sale. That is why I put the September 31 sheet in as being the nearest I could find.

The Court: Did Mr. Moores say anything in that respect?

Mr. Ferguson: Mr. Moores stated there would not be enough cash.

The Court: I suppose that is a fact, is it not?

Mr. Jordan: I do not think it could be denied. I think that is all.

Mr. Ferguson: That is all.

ALFRED J. MAYMAN,

recalled.

Mr. Ferguson: Q. Mr. Mayman, were you in court this morning?

A. Yes, I was, Mr. Ferguson, but I was a little late.

Q. Did you happen to hear Mr. Jordan's interrogation of Mr. Moores with respect to the letter addressed to the stockholders, dated November 13, 1940? A. Yes, I heard that.

Q. And referring to that letter set forth in the meeting of the stockholders held on November 15, 1940, do you recall that?

A. Yes. I thought it was the meeting of November 4.

Q. You may refresh your recollection. The meeting of the stockholders November 15, 1940 sets it forth, does it not?

A. Wouldn't it be the meeting of the 4th of November?

Q. I think the directors meeting of November 4 directed that this letter of November 13, 1940 be sent. Did you, as Secretary, mail this letter to the then existing beneficial certificate [692] holders?

A. Yes.

Q. You mailed them on November 13, 1940?

A. That is my best recollection, I am not sure of the date, but I think that was the date.

Q. And according to the minutes, you were present at this meeting on November 15. That is the fact? A. Yes, that is the fact.

(Testimony of Alfred J. Mayman.)

Q. Was any protest or any objection to the trustees' approval of the sale then made?

A. There was no protest made then nor did I hear, as Secretary of the Company, by registered mail or otherwise, from any of the beneficial owners.

Mr. Ferguson: That is all.

Mr. Jordan: No questions.

J. T. KRUEGER,

called for Defendants and Petitioners; sworn.

Mr. Ferguson: Q. Where do you reside, Mr. Krueger? A. Berkeley, California.

Q. What is your occupation?

A. I am a certified public accountant.

Q. By whom are you employed, or with whom are you associated?

Mr. Jordan: Mr. Ferguson, I will be glad to stipulate to Mr. Krueger's qualifications.

Mr. Ferguson: Q. You are a partner of Forbes & Company, I understand? A. I am.

Q. Are you familiar with the reports of Forbes & Company which are in evidence, those being the reports for the period ending June 30, 1936, December 31, 1936, December 31, 1937, December 31, 1938, December 31, 1939, November 15, 1940, and December 31, 1940, being Respondents' Exhibits 3-A to 3-F, inclusive?

A. I am generally familiar with all of those.

(Testimony of J. T. Krueger.)

Q. Was the preparation of those reports under your general super- [693] vision?

A. All of them.

Q. Now, in connection with your familiarity, did you have occasion to be familiar with the write-down of the assets that took place in December, 1935?

A. Yes, I am familiar with the write-down.

Q. You are familiar with the reports in that connection? A. I am.

Q. In your opinion as an accountant, did that write-down represent a mere bookkeeping adjustment on the part of the company?

A. No, it did not. It was an effort on the part of the management and of their accountants, the firm with which I am associated, to reflect the conclusions reached in connection with the plan of reorganization, or, more specifically, it was an effort to set forth as accurately as possible, the financial condition of the company at or about that time.

Q. And in your opinion the write-down did do that, it accomplished that?

A. Am I allowed some latitude?

Q. I wish you would explain your answer.

The Court: Explain your answer if you wish.

A. Briefly, the situation was this, when we undertook the first engagement as a result of which we rendered a reprot dated August 4, 1936, covering the fifteen-month period from April 1, 1935 to June 30, 1936, we had access not only to the books

(Testimony of J. T. Krueger.)

of account, but we had access also to copies of the plan of reorganization which had been approved by the Court, and disseminated to all interested parties; we had access also to a report compiled by a gentleman by the name of Bourne, as I recall, I have not seen the report recently, so I am calling on my memory of the printed plan of reorganization which was disseminated, and, according to my understanding, approved by the Court, and also from the auditor's report it appeared that, reference was made that there had been [694] no consistent depreciation period, that in some years no deductions were made for depreciation, some years round sums were deducted, and still other years odd amounts which could not be substantiated, by which I had no way to determine how they were computed. Furthermore, there was some reference to the fact that quite possibly additions had been made in the accounts to property which did not replace capital additions, and with all of that in mind Mr. Bassick, the trustee, called upon an appraisal engineer, Mr. J. A. Smiley, to make an appraisal of the property at or about the date the plan of reorganization became effective, and in view of all of the uncertainty as to the significance of the book figures it was deemed advisable by all concerned to accept as correct the value set forth by this appraisal engineer. I might state also that we not only were engaged at that time to make an audit of the accounts, but we were also engaged to see that the books of ac-

(Testimony of J. T. Krueger.)

count reflected the plan of reorganization, and in connection with our work we did so feel that the books reflected the conclusions reached in the plan of reorganization. I might say further with respect to that matter, if I am not going too far in my answer to the question, that these appraisal values have since been used as a basis of Federal tax return, and while it is true that the company has had some adjustment with respect to revamping that, I understand those values have been accepted by the Treasury Department.

Mr. Ferguson: That is all.

Cross Examination

Mr. Jordan: Q. Mr. Krueger, how much depreciation, in your opinion should have been deducted and was not?

A. I could not answer that question, because we have no way of telling from the data available as to the cost of the assets then [695] in existence. It was our understanding from the data available to us this \$724,000 was a figure which had no accounting significance. That was the reason for having an appraisal made, or one of the reasons for having an appraisal made.

Q. Was the appraisal value used as the new value?

A. No, the appraisal value was worked out, first of all, on the basis of historical cost, accrued depreciation to that date, and the resultant figure of historical cost less depreciation.

(Testimony of J. T. Krueger.)

Q. How much expense has been capitalized?

A. I don't know that any was capitalized for that matter. I think that statement was made in the report of the prior auditor. Personally, we did not go into those early records.

Q. What was the amount of the obsolescence that was taken?

A. I do not believe that I stated there had been any taken. I believe it should have stated in the reports as to whether there was any obsolescence. I do not know as to the amount, if any.

Q. In adjusting the appraisal what was done with capital additions in the past as additions to the historical cost?

A. I am not quite sure that I understand your question, but starting with that basis, we took Mr. Smiley's appraisal, setting up a historical cost and to that was added any additions subsequent to the date of his appraisal. I am not sure that I answered your question, but that is as close as I can come to it.

Q. Tell me this, was the reduced value of the plant used as a basis in connection with the sale in order to arrive at a taxable profit, or was there a taxable profit involved in the sale?

A. That is a rather complicated matter, Mr. Jordan, and without better details I would hate to be too specific. I might say, in general, the amount of tax payable would depend on [696] the period of time held by the owners and so on. I would hesitate, without referring to the record, to set forth

(Testimony of J. T. Krueger.)

even a general idea of what the tax liability would be. However, I might state in determining the amount of profit, if that is what you are attempting to develop, in determining the amount of profit which might or might not be subject to Federal tax, that computation is based upon an appraised value.

Q. Did your firm prepare the 1940 return of the company? A. We did.

Q. Was that \$131,000, approximately, returned as a profit in the return?

A. I would have to examine the return to state specifically on that; as I attempted to bring out before in connection with sales of so-called capital assets, there is a rather complicated formula for determining just which type of property was subject to tax, and those which are not. Frankly, from memory I could not give you the pertinent sections of that statute.

Q. In other words, you don't know whether or not, for tax purposes, that \$131,000 of profit so-called, out of the sale, was put into the return as such and tax paid on it?

A. It was put in the return as such. I wish to repeat that I don't know whether the tax was paid on the full \$131,000. However, such portion of it as was taxable under the Code was included in the 1940 return as a profit subject to tax.

Redirect Examination

Mr. Ferguson: Q. When you referred to Mr.

(Testimony of J. T. Krueger.)

Smiley's appraisal as historical value, that was the depreciated historical value, was it not?

A. I think I referred to it as the historical cost.

Q. Depreciated, was it not?

A. No, that was his best estimate [697] of what the machinery cost originally.

Q. Oh, yes, I understand.

The Court: We will take a recess for a few minutes.

(After recess:)

Mr. Ferguson: If your Honor please, the Defendants and Petitioners rest.

Mr. Jordan: I wonder if I might ask Mr. Krueger just two questions.

The Court: All right.

J. T. KRUEGER,
recalled;

Recross Examination

Mr. Jordan: Q. All of the reports of John F. Forbes & Company that have been introduced in evidence in this case were signed by you, Mr. Krueger?

A. They were all reviewed by me. Whether I manually signed them all I could not say at this time.

Q. In any event, you supervised the preparation of them in each instance? A. I did.

(Testimony of J. T. Krueger.)

Q. And those reports represent your opinion as to the proper statement of the affairs of The Joshua Hendy Iron Works, now Hendy Realization Company during the period in question, from March 24, 1936 to the end of December, 1940?

A. At the respective dates, yes.

Mr. Jordan: That is all.

Mr. Ferguson: No questions.

Mr. Jordan: Plaintiff has a brief amount of rebuttal, your Honor. Is there any objection to introducing this in evidence? (handing)

Mr. Ferguson: I don't think it is binding on any of the defendants. [698]

The Court: What is it?

Mr. Jordan: It is a letter that was written to myself by Mr. Ferguson on March 7, 1940, and it goes to the question of the value of the stock of this company at that date. We have had a great deal of evidence here in the form of letters and I consider this just as material as any of the rest of them are. I would like to read it into the record.

Mr. Ferguson: If your Honor please, the purport of that letter was in regard to some stock certificates Mr. Behneman had lost, and the question was whether a bond would have to be put up, and I wrote him and gave him my view as to what the

value of that stock was. That was not binding on the defendants.

The Court: I was wondering if you knew what the value of the stock was.

Mr. Jordan: Perhaps I can submit the letter to your Honor and you can determine whether it would be proper.

Mr. Ferguson: I have no objection to the letter being shown to the Court.

The Court: If you want to put it in evidence it may go in.

Mr. Jordan: I will offer it in evidence as Plaintiff's Exhibit next in order.

The Court: It may be admitted and deemed read into evidence.

(The letter was marked

“PLAINTIFF'S EXHIBIT 7,”

and is as follows:

“Law Offices of
Stanley Pedder and Kenneth Ferguson
405 Montgomery Street,
San Francisco

“March 7, 1940

“Mr. Paul S. Jordan,
Attorney at Law,
Russ Building,
San Francisco, California. [699]

“Dear Paul:

“We have your letter of March 6, 1940, inquiring as to the value of the stock of The Joshua Hendy Iron Works as the basis for pro-

curing an indemnity bond to indemnify The Joshua Hendy Iron Works in the issuance of Trustees' Certificate against 304½ shares of its stock to be surrendered to it, now standing in the name of F. J. Behneman, but owned by Dr. Harold M. F. Behneman.

"We have discussed this matter with the President of the Company, but are advised by him that it is impossible to allocate any particular value to the stock. While the Company's affairs are much improved, it still has substantial outstanding obligations and it is therefore impossible to hazard an opinion as to what the stock may be worth. Its value at the present time is obviously not its par value, but I am afraid that under the circumstances the par value is all that we can rely upon for this purpose.

"Should you have any trouble in procuring a bond upon this basis, if you will communicate with Mr. Robert Pedder of our office, who will be handling this matter in my absence during the next few weeks, we will be glad to do anything that we can in order to work out the situation.

"With kindest personal regards of the writer, we are

"Yours very truly,

STANLEY PEDDER AND
KENNETH FERGUSON

By KENNETH FERGUSON.")

Mr. Jordan: I will call Mr. Gane. [700]

ROBERT M. GANE,

recalled by Plaintiff and Respondents in Rebuttal.

The Witness: Your Honor, before any questions are asked I would like to refer to a figure that I used in testifying previously, which I over-stated somewhat. I do not think it is material, but for the purpose of the record perhaps I should correct it.

The Court: Very well, you may, if you wish.

A. In reference to the write-down of the plant assets I referred to the amount as \$399,000, whereas the report showed that to have been \$350,000 or \$320,000. One report shows one figure and the other shows the other figure.

Mr. Jordan: Q. You are referring now to Plaintiff's Exhibit 4, Approximation of financial position at March 24, 1936, are you?

A. No, I am referring to the Forbes Report, and I used the figure from memory, without specifying it as being accurate, but merely because it was over-stated. It might be better if the record was clear on that point.

Q. Mr. Gane, I am going to show you Respondents' Exhibit F,—I believe you have seen it before—and ask you to look at it. I believe you have a copy of it that I furnished you. Can you explain the difference, if any, between the figures which you gave the Court on your direct examination in

(Testimony of Robert M. Gane.)

connection with the Plaintiff's case in chief and those submitted in Respondents' Exhibit F?

Mr. Ferguson: One moment, I object to this line of inquiry as not proper rebuttal, it is calling for an opinion. If there is any contention that these figures in Exhibit F do not accurately reflect the books, he can offer the books.

The Court: Objection sustained. [701]

Mr. Jordan: I was going to ask the same question with respect to Respondents' Exhibit G. I presume the ruling would be the same?

The Court: Yes. I think that the objection, that it is calling for an opinion, is good, Mr. Jordan.

Mr. Jordan: May I ask him a question as to that?

The Court: Make your offer.

Mr. Jordan: Q. I will show you Respondents' Exhibit G, Mr. Gane. Do you recall that statement?

A. Yes.

Q. I am going to ask you, referring to that exhibit, how do the figures there set forth agree with the testimony which you gave on your direct examination?

Mr. Ferguson: The same objection, if your Honor please.

The Court: Sustained.

Mr. Jordan: Q. I am going to show you the original answers to interrogatories propounded in this matter, Mr. Gane, sworn to by Mr. Moores. You have previously examined these answers, have you not? A. I have.

(Testimony of Robert M. Gane.)

Q. I am also going to show you the Forbes statement of December 31, 1940, Plaintiff's Exhibit No. 3. You have also examined that statement?

A. I have.

Q. Now, I will ask you first to refer to Answer 15, which refers to net income of \$181,839.67 for 1940, and also ask you to refer to the reference to net loss shown on December 31, 1940, Forbes Report, and ask you to state whether or not it is possible to reconcile those two figures?

Mr. Ferguson: The same objection, and the additional objection it constitutes an argument.

The Court: Sustained.

Mr. Jordan: That is all, Mr. Gane. [702]

Mr. Ferguson: All of the questions were objected to and the objections were sustained. No questions.

Mr. Jordan: That is the Plaintiff's case, your Honor.

The Court: Are you ready to argue the matter now?

Mr. Jordan: I would be perfectly willing to argue the matter if your Honor wishes, orally, or, if your Honor would permit, submit a memorandum.

The Court: No, I think I would like to hear you argue the matter. I was wondering if you are prepared to do that now.

Mr. Jordan: There has been quite a mass of facts gone into the record here. I think, for my-

self, that I would appreciate an opportunity to sort of correlate those facts.

The Court: Would it meet your approval if I would continue it until next Tuesday morning at ten o'clock, and I will allow an hour on each side for argument.

Mr. Jordan: Thank you very much.

Mr. Ferguson: That is entirely agreeable to us.

[Endorsed]: Filed March 12, 1942. [703]

[Endorsed]: No. 10085. United States Circuit Court of Appeals for the Ninth Circuit. Gladys M. Shores and Harold M. F. Behneman, Appellants, vs. Hendy Realization Co., a corporation, (formerly The Joshua Hendy Iron Works,) A. J. Mayman, C. B. Moores, E. Price, A. E. Webber and W. R. Bassick, individually and as the Directors of Hendy Realization Co., Elmer M. Hyland and Morris Levit, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed March 13, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States
Circuit Court of Appeals

For the Ninth Circuit.

GLADYS M. SHORES and HAROLD M. F.
BEHNEMAN,

Appellants,

vs.

HENDY REALIZATION CO., a corporation
(formerly THE JOSHUA HENDY IRON
WORKS), A. J. MAYMAN, C. B. MOORES,
E. PRICE, A. E. WEBBER and W. R.
BASSICK, individually and as the Directors of
Hendy Realization Co., ELMER M. HYLAND
and MORRIS LEVIT,

Appellees.

Supplemental Transcript of Record

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.



In the Southern Division of the District Court of
the United States for the Northern District
of California

Before Hon. Burton J. Wyman, Special Master
No. 25937-S

In the Matter of THE JOSHUA HENDY IRON
WORKS, a corporation,
Debtor.

BRIEF OF HAROLD M. F. BEHNEMAN
ON OBJECTIONS TO PLAN OF
REORGANIZATION

The Court Has No Power or Authority to Approve
Subdivision G (2) of the Proposed Plan
of Reorganization

This portion of the plan of reorganization provides for the compulsory surrender of fifty per cent of the shares by each stockholder to the Board of Directors to be given by it to other individuals under the guise of corporate reorganization. We believe it will be granted that the only plan of reorganization which a court can approve, insofar as stockholders are concerned, is the plan which is specified in 77b of the Act and this is as follows:

“A plan of reorganization within the meaning of this section; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either

through the issuance of new securities of any character or otherwise.” [1]

We submit that the rights of stockholders are not altered or modified by taking the shares away from one and giving them to another or in other words by merely changing the personnel of the stockholders. It is our conception that stockholders have no rights except those which are incident to the shares and unless the shares are changed or modified in some particular the rights of stockholders have not been altered or modified. Showing that this is the correct fundamental conception of the “rights of stockholders” we quote from *Winslow vs. Fletcher* (Conn) 4 Atl. 250 at 253:

“The stock of a corporation, says Mr. Lowell ‘may be defined as the sum of all the rights and duties of stockholders. . . . Each share, therefore, is but a fraction of all the rights and duties which compose this sum.’ ”

Under Section 77b, voting rights of stock might be modified or altered, dividend rights might be changed and Series A stock might be relegated to the position of a Series B. Even G (1) of this plan might be considered an alteration or modification of the rights of stockholders which provides that the voting power shall be transferred to the Board of Directors for a given number of years. But the rights of stockholders are not modified or altered by merely changing the personnel of the stockholders; the corporation has the same number of shares

outstanding, the same dividend rights are outstanding and the same voting rights are outstanding. We submit that this plan G (2) has no relation whatever to a corporate reorganization which necessarily presupposes a change in its corporate structure or in its financial situation. This plan G (2) looks like an attempted reorganization of the stockholders. If a plan for corporate reorganization can force a stockholder to give his shares to a third person then it could force a creditor to give a portion of his indebtedness to a third person or a bondholder to give some of his bonds to a third person. [2] It seems to us if this is the construction to be given 77b then it is unconstitutional, as it would be depriving a stockholder or a creditor or a bondholder of his property without due process of law. Section 77b partakes of the nature of an act for debtor's relief and this plan imposed upon the stockholders in no way relieves the debtor corporation.

If we measure this provision of 77b by the well known canons of construction we believe we will come to the same conclusion. We have a principle of construction known as "ejusdem generis" which is defined in 19 C. J. page 1255 as follows:

"A well known maxim of construction to aid in ascertaining the meaning of a statute or other written instrument, the doctrine being that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind."

Section 77b provides that the rights of stockholders may be modified or altered. How? "Either through the issuance of new securities of any character or otherwise". Here we have a statement that the rights of stockholders may be modified or altered by a modification of the security. The general phrase "or otherwise" takes on the character of the particular. The words "or otherwise", as so used, are distinctly held to take upon the character of the particular in the case of *People vs. McKean*, 76 Cal. App. 114, where it is held that the term "or otherwise", in the provision of Section 317 of the Penal Code that every person who wilfully offers his services "by any notice, advertisement or otherwise" to assist in the production or facilitation of a miscarriage or abortion is guilty of a felony, should be construed as signifying other like means, namely, other means which are of the same general nature or class as those notices which are akin to advertisements. The court in that case says (p. 121): [3]

"But we venture to assert that no authority can be found where the general words 'or otherwise' when following particular and specific words, have been construed as having their unrestricted sense where such a construction would cause the preceding particular words as well as the general words to become meaningless surplusage. And yet that is precisely the result which must inevitably follow if the words 'or otherwise', as used in Section 317 be given

their full unrestricted meaning. That is to say, if the words, 'or otherwise' be not construed as meaning 'other such like means,' then the whole phrase 'by any notice, advertisement, or otherwise' becomes mere barren verbiage, sterile of effect."

In construing Section 77b, if the words "or otherwise" are to be taken in an unlimited sense then why did the Act of Congress not specify that the rights of stockholders might be modified in *any particular*;* and, if it is to be construed as meaning that the property of stockholders may be taken away and given to third persons, why did it not provide that the rights of the *present* stockholders might be modified?

We submit, therefore, that 77b is not to be construed as giving the right to this court to deprive any stockholder of his stock and compel him to give it to third persons; and, if it is to be so construed, then it is unconstitutional because it deprives a person of his property without due process of law. Such an act so construed is not one for the relief of debtors and has no relation whatever to a corporate reorganization.

G (2) of the Plan Should Not Be Approved Because It Is Not Fair and Equitable

The Act provides that the court shall approve the plan of reorganization if it is fair and equitable. In this particular case Harold M. F. Behneman,

*Italics are in original.

who filed this objection is the largest stockholder, owning and holding 1,244½ shares out of a total of 4,425 shares issued. The only other two large stockholders are the estate of Mrs. M. F. McGurn, owning and holding 861½ shares and Mrs. A. M. Hendy, owning and holding 969½ shares. [4] Without the consent of the estate of McGurn the requisite consent could not have been obtained and although the executor of this estate testified in effect that he voluntarily signed this consent the surrounding circumstances are such as to indicate that he was not entirely a free agent. All of these shares belonging to the McGurn estate are pledged to the Bank of California and the executor testified that under the circumstances he did not care to run contrary to the will of the Bank of California. Was it not peculiar to say the least that he did not communicate with the attorney for the estate; that he did not request the attorney for the estate to get an order of the probate court allowing the executor to approve the plan? Was it not peculiar that when he was asked why he did not ask the attorney for the estate to attend to it his reply was simply that "he didn't know." Here we have a plan to take away fifty per cent of the shares of Harold M. F. Behneman and to give it to the Board of Directors (which it is obvious will be entirely controlled by the Bank of California, a secured creditor) and to be by the Board given to third persons "in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for

management and the successful rehabilitation of the company's affairs." It is to be assumed that the managing officers will be paid their salaries; and we submit that they should be rewarded from the assets of the company. Why should this supposed extra reward be taken out of the pockets of the stockholders? Why not take some of this supposed reward from the security held by the Bank of California?

Again what is meant by "successful rehabilitation of the company's affairs?". It is meaningless as it stands and is undefined. Does it mean when the company is on a dividend paying basis? Does it mean when the creditors are paid, or what does [5] it mean? Apparently this also is to be left "in the sole discretion" of a Board of Directors wholly dominated by a secured creditor.

We therefore respectfully submit that this portion of the plan known as G (2) should be rejected and should not be approved by the court, first, because it is not a thing which is contemplated by the statute and, second, because it is not fair and is unjust.

Dated: January 6, 1936.

BYRNE, LAMSON & JORDAN

Attorneys for objecting stockholder Harold M. F.
Behneman

(Admission of Service)

[Endorsed]: Filed with Spl Mster Jan. 6, 1936.

[Endorsed]: Filed with Clerk Feb. 19, 1936. [6]

[Title of District Court and Cause.—No. 25937-S.]

MEMORANDUM OF POINTS AND AUTHORITIES OF W. R. BASSICK, TRUSTEE, AS AMICUS CURIAE, ON FURTHER HEARING UPON PROPOSED PLAN OF REORGANIZATION

At the hearing heretofore had upon the proposed plan of reorganization of the debtor (The Joshua Hendy Iron Works), Harold M. F. Behneman, a stockholder, by Leo D. Byrne, Esq., his attorney, argued that paragraph G of the proposed plan does not “modify” the rights of the debtor’s stockholders within the purview of Section 77B of the Bankruptcy Act. W. R. Bassick, trustee for the debtor, is obviously concerned with the proposed [7] plan only insofar as it is fair and for the apparent advantage of the debtor, and the ultimate support of the proposed plan naturally rests with the stockholders and creditors who have presented and accepted it. Inasmuch, however, as the trustee has testified, at earlier hearings, that he believes the proposed plan fair and feasible, and for the benefit of all interested parties, he, amicus curiae, presents this memorandum for the information, assistance, and consideration of the court.

If Section G of the Proposed Plan Is Within the Purview of Section 77B, Behneman’s Objection Is Immaterial.

a. The debtor is insolvent.

It was conceded by Behneman and all others pres-

ent at the hearing held on October 22, 1935, that the debtor is insolvent. The effect of such insolvency is to eliminate the necessity of acceptance of the proposed plan by a majority of the stockholders, and to make Behneman's objection immaterial.

Bankruptcy Act, Section 77B, subdivision (e)(1);

In re William Penn Garage (District Court, Western District of Pennsylvania, October 7, 1935) reported in C. C. H. Bankruptcy Service, paragraph 3649;

In re Continental Cigar Company (District Court, Northern District of Pennsylvania, October 30, 1935) reported in C. C. H. Bankruptcy Service, paragraph 3652.

In the reorganization of the William Penn Garage, *supra*, the court said:

"It is not necessary that provision be made in the plan for stockholders where the debtor is insolvent as is the fact in this case, nor is it necessary that provision be made for junior lien creditors where the lien of such creditors is of no value."

Again, in the reorganization of the Continental Cigar Company, *supra*, the court said: [8]

"Exceptions by a minority stockholder to the findings and report of the Special Master recommending that the plan of reorganization be

confirmed by the court. The Special Master found that the debtor is insolvent; that the plan of reorganization was approved by creditors holding two-thirds in amount of unsecured claims, being two-thirds in amount of each class of claims which have been allowed and would be affected by the reorganization; that acceptances have also been filed on behalf of stockholders holding a majority of each class of stock; that the plan of reorganization is fair, equitable, and feasible; that the plan has been accepted as required by the provisions of Section 77B; and that the offer and acceptance of the plan have been made in good faith. The only objection to the confirmation of the plan has been made by a minority stockholder. If the finding is correct that the debtor is insolvent, the stockholders are not affected by the plan, and insolvency eliminates the necessity for acceptance by a majority of the stockholders as a prerequisite to confirmation of the plan.

“The Special Master, upon consideration of the testimony, the appraisal, and schedule of liabilities, found that the debtor was insolvent. The court is of the opinion that the finding of insolvency as well as the other findings of the Special Master are correct and that the exceptions to the confirmation of the reorganization plan are without merit.”

- b. A majority of the stockholders of the debtor have accepted the proposed plan.

Even if the debtor were not insolvent, Behneman's objection is still immaterial, because the proposed plan of reorganization has been accepted, by verified acceptances on file with the Special Master, by stockholders holding more than a majority of the capital stock of the debtor, i. e., by stockholders holding 65.26%. The verified acceptances of stockholders and creditors of every class are, in fact, on file in numbers exceeding the percentages required by Section 77b, i. e., by the "Class A" creditor, The United States of America, 100%; by "Class B" creditors, 94.05%; by the "Class C" creditor, 100%; by the "Class D" creditor, 100%; by "Class E" creditors, 69.02%; and by "Class G" stockholders, as above noted, 65.26%.

In order to be entitled to any consideration, therefore, [9] Behneman must establish that the provisions of paragraph G of the proposed plan are not within the provisions of Section 77B. Such is, however, neither the law nor the fact.

Paragraph G of the Proposed Plan Is Within
the Purview of Section 77B.

Subdivision (b) of Section 77B, upon which Behneman's contention is based, provides as follows:

"(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of

creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions MODIFYING or ALTERING the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character OR OTHERWISE: * * *” (emphasis ours)

It is submitted that the language of this section is plain and unambiguous, and means exactly what it says. Within the authority of this provision, it is clearly established that where there is no equity for stockholders, as is the case here, the stockholders may be wholly wiped out.

In re William Penn Garage, *supra*.

In re Central Funding Corporation; Union Trust Co. vs. Wagner (Circuit Court of Appeals for the 2nd Circuit of New York, February 11, 1935, Augustus Hand, Judge) reported in C. C. H. Bankruptcy Service, paragraph 3229.

Since the court has power, by means of reorganization, to wipe the stockholders out entirely, a fortiori it has power to modify or alter their rights to some lesser extent.

Thus, in the reorganization of the Consolidation Coal Company (In Re Consolidation Coal Company (District Court of Maryland, July 10, 1935) re-

ported in C. C. H. Bankruptcy Service, paragraph 3538); the court upheld a plan of reorganization which provided that common stockholders should receive warrants which, [10] upon the payment of \$25.00 per share, would entitle them to acquire new common stock, it being provided that if the stockholders should not exercise such warrants, by the payment of such additional amount, that they should receive nothing. In such connection the court said:

“The question before the court is whether the plan of reorganization, proposed by creditors of the Consolidation Coal Company should be approved.

“These objections may be summarized as being two-fold: the primary objection is raised by the owners of some 40,000 shares of the common stock of the company who—without having presented any single, concrete plan, except to ask for some stock, without having to pay for it, or some sort of junior security,—assert that the common stockholders have been unjustly discriminated against by the allotment to them of warrants, giving them merely the right to subscribe to the new common stock at \$25.00 a share, which will be hereafter referred to.”

The court then refers to the other contention, asserted by certain bondholders, that Section 77B is unconstitutional; denying such contention upon

the authority of *Campbell vs. Alleghany Corporation*, 75 Fed. 2nd 947.

Discussing the plan of reorganization, and finding it fair etc., and noting that altho the assets are carried upon the books at \$60,000,000.00 they have, in all probability, a value of not to exceed \$33,000,000.00, the court concluded:

“The court believes that the value of approximately \$33,000,000.00 placed upon the company’s assets is sufficiently accurate for the purposes of these proceedings.

“What has already been said would seem to be a sufficient answer to the contention of the objecting common stockholders that they should be accorded greater rights, but if the position of the bondholders be further analyzed, the evidence is even more convincing against this contention, and to the effect that there is no real equity for the old common stockholders. That is to say, if we take into account the funded debt and the interest thereon in arrears, the collateral notes and the preferred stock and the dividends thereon in arrears, we find the company has a total debt due to the bondholders senior to the common stock of more than \$46,000,000.00.” [11]

Under these circumstances, the court found that the common stockholders in receiving warrants, were being treated fairly.

It may be noted, in passing, that in this case the

court approved a plan of management of the reorganized corporation almost identical with that proposed in the present plan, providing that for five years the management should repose in five trustees selected by the creditors, each group having a representation on the Board.

Again, in *In Re Central Funding Corporation; Union Trust Co. vs. Wagner*, *supra*, the court, holding that Section 77B is constitutional, that a plan of reorganization may cover property in which the debtor has no equity, and that a plan of reorganization is not improper because it liquidates the interest of bondholders over a ten year period, said:

“The appellant earnestly contends that the plan is not a reorganization within the meaning of Section 77B. We cannot, however, doubt that it is within the general meaning of the word “reorganization”. In common parlance that word is not limited to cases where the rights of all persons interested in a corporation, whether lienors, general creditors or stockholders, are made to survive under some new corporate arrangement. Not infrequently the rights of some of these classes have become so worthless that they deserve and receive no recognition in the reorganization. Judge Baker recognized this when he said in his opinion in *Investment Registry vs. Chicago & M. E. R. Co.*, 212 Fed., 594, 609, that:

‘Reorganization * * * means, usually, that the equity of the stockholders, if any ever

existed in actual value, has vanished; that the property virtually belongs in equity to the bondholders; and that, if the bondholders will combine for the mutual protection of their equal interests, they will have a practical monopoly of the bidding.'

"A 'reorganization' does not necessarily presuppose the survival of the rights of stockholders or even of junior creditors, when they have become worthless, but may be a readjustment of the rights of lienors under a new corporate structure. While this has generally been effected through foreclosure sales, such has not always [12] been the method, and Section 77B was evidently inserted in the Bankruptcy Act in order among other things to facilitate corporate readjustments without the delay, complexity and difficulty inherent in the cumbersome methods that were formerly regarded as necessary."

Noting that Section 77B covers insolvent debtors as well as debtors merely "unable to meet their debts as they mature" the court expressly cites subdivision (b)(1) and (2), concluding:

"Thus a plan of reorganization may or may not provide for an issuance of new securities to stockholders."

Under the proposed plan in this case all of the creditors have modified their rights, scaled down their indebtednesses, decreased interest rates, and

extended maturity dates. Not only is it proper for the proposed plan to provide for a similar scaling down by the stockholders, but it would be improper for the plan not to so provide. In an article in 30 Illinois Law Review 137, commenting upon Section 77B, this principle is affirmed as follows:

“To require no sacrifices whatsoever of stockholders while decreasing interest rate, extending the maturity date or otherwise affecting the rights of creditors will constitute a direct controvention of the doctrine of *Northern Pacific Railway vs. Boyd*, 228 U. S. 482.”

Should Behneman repeat the contention made by him at the earlier hearing that, although the plan could provide for the complete foreclosure of the stockholders' rights, it could not provide for their partial extinction where the stock surrendered was to be used by the debtor as the reward for future management, the contention may be simply answered by pointing out that the court could, in view of the fact that the debtor is insolvent, order any percentage of the stock up to 100% surrendered to the debtor, and then order the debtor to reward its management, not only by salaries, but by the issuance of the treasury stock thus acquired. What the plan and the court may direct in two moves [13] it obviously may consolidate into one.

Conclusion

As Prof. John Gerdes points out in his article on Section 77B (12 New York University Law Quar-

terly, September, 1934 1) the proposed plan is prima facie fair upon its face, particularly so in that it has been accepted by two-thirds of the creditors and a majority of the stockholders. The proposed plan, insofar as it relates to stockholders, is squarely within the contemplation and broad provisions of Section 77B and, moreover, in view of the insolvency of the debtor, is extremely liberal to the stockholders in that it requires them to give up only 50% of their holdings, instead of 100%. It is therefore submitted that Behneman's contention is without merit, and that the proposed plan of reorganization of the debtor is fair, feasible, and proper.

STANLEY PEDDER

KENNETH FERGUSON

Attorneys for W. R. Bassick, trustee.

[Endorsed]: Filed with Spl Master Jan. 10, 1936.

[Endorsed]: Filed with Clerk Feb. 19, 1936. [14]

[Title of District Court and Cause—No. 25937-S.]

BRIEF OF PETITIONING CREDITORS IN
SUPPORT OF THE PROPOSED PLAN OF
REORGANIZATION AND IN REPLY TO
THE BRIEF OF HAROLD M. F. BEHNE-
MAN

The objecting stockholder, Harold M. F. Behneman, objects to the approval of paragraph G, sub-

division 2, of the proposed plan of reorganization on the following two grounds:

1. That the rights of stockholders are not altered or [15] modified within the meaning of subdivision (b). (2) of section 77B of the Bankruptcy Act;

2. That paragraph G, subdivision 2, of the plan of reorganization is not fair and equitable.

Subdivision 2 of paragraph G of the plan of reorganization provides as follows:

“The remaining 50% of the shares so delivered by each stockholder shall be held by said Board free and clear of any claim, right, title, or interest therein by such stockholder, to be distributed by said Board, in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company’s affairs.”

The relevant provision of section 77B of the Bankruptcy Act states:

“(b) A plan of reorganization within the meaning of this section * * * (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character or otherwise ;* * *.”

I.

Subdivision 2 of paragraph G of the plan of reorganization is a modification or alteration of the rights of stockholders within the meaning of the statute.

The contention of counsel for the objecting stockholder that the above quoted provision of the plan of reorganization does not modify or alter the rights of stockholders within the meaning of subdivision (b) (2) of section 77B of the Bankruptcy Act (Tr. pp. 37-39) is made despite the fact that Leo D. Byrne, Esq., of counsel for the objecting stockholder, made the following concessions at the hearing of this matter before Judge W. A. Beasley, as special master, on October 22, 1935: (1) that the plan of [16] reorganization might take away the stock of the stockholders absolutely, and (2) that the debtor corporation is insolvent (Tr. pp. 38, 39). It appears to us too obvious for argument that if the rights of stockholders may be entirely destroyed, as has been held in a number of decisions,¹ the rights may be changed to a limited degree.

1. In re Central Funding Corporation (2nd Cir., C. C. A., February 11, 1935), 75 F. (2d) 256;

In re William Penn Garage (D. C., W. D. Pa. Oct. 7, 1935), C. C. H. Bankruptcy Law Service, p. 1682, par. 3649;

In re Continental Cigar Co. (D. C., N. D. Pa. Oct. 30, 1935), C. C. H. Bankruptcy Law Service, p. 1684, par. 3652;

See also: Bankruptcy Act, sec. 77B, subd. (e) (1): "A plan of reorganization shall not be confirmed until it has been accepted in writing, * * * And provided further, That such acceptance shall not be requisite to the confirmation of the plan by any stockholder or class of stockholders (1) if the judge shall have determined either that the debtor is insolvent, or that the interests of such stockholder or stockholders will not be affected by the plan, * * *."

Under paragraph G of the plan of reorganization, the rights of the stockholders in 50 per cent of the shares of stock are abolished. In our opinion this is tantamount to an alteration or modification of the rights of those stockholders. A case which presents a somewhat analogous situation is the comparatively recent case of *Application of Silberkraus*, 250 N. Y. 242, 165 N. E. 279, decided by the Court of Appeals of New York on February 13, 1929. In that case the appellants were the holders of a small minority of shares of the second preferred stock of Schaffer Stores Company, Inc. They claimed that the preferential right of such shares had been altered by the amended certificate of incorporation which on March 31, 1926, over their objection, was authorized by a majority of more than two-thirds. They applied for an appraisal of the [17] value of their shares and payment therefor by the corporation under a certain section of the Stock Corporation Law of New York. Holders of the second preferred stock provided for in the original certificate were required by amended certificate to exchange their stock for new convertible stock limited to the payment of 7 per cent dividends and callable at 110, whereas the old stock paid dividends of 10 per cent and might acquire a market value far in excess of sale, and were entitled to share on distribution of assets only to half of the amount of the new shares. The question presented was whether the preferential rights of the outstanding shares of the old second preferred had been altered by the amended certificate of incorporation, within the pro-

vision of the statute which gave stockholders not voting in favor of such alteration the right to have his shares appraised "If the certificate alters the preferential rights of any outstanding shares, * * *" (sec. 38, subd. 12, N. Y. Stock Corporation Law). Upholding the right of the appellants to have their shares of stock appraised under the statute, the majority of the court said (p. 280):

"Neither the preferential right of the old stock nor even the old stock itself persists. Both disappear. The stock is retired, and, with its retirement, its preferential right falls. A right to participation at par in the distribution of assets is attached to the new stock, but the fact that that right is similar to the old ones belonging to the two classes of stock which have been abolished does not prevent an alteration of the abolished right. *Abolition is alteration*" (italics ours).

We believe the objection made by counsel for the objecting stockholder that the rights of stockholders were not modified or altered within the meaning of section 77B by the above quoted paragraph G of the plan of reorganization in the final analysis merely presents a question of the fairness of the plan. As heretofore [18] stated, it has been held in the decisions referred to above, and in other decisions,² that the rights of stockholders may be en-

2. See also: *In re Consolidation Coal Co.* (D. C. Md. July 10, 1935), 11 F. Supp. 594, C. C. H. Bankruptcy Law Service, p. 1565, par. 3538.

tirely destroyed if the corporation is insolvent, providing the plan is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders. Long before the adoption of section 77B of the Bankruptcy Act, it was the rule that the stockholders' interest in the property of the corporation is subordinate to the rights of unsecured creditors, and in the event of the reorganization of the insolvent corporation, the unsecured creditors are entitled to the benefit of the values which remain after the lien holders are satisfied before stockholders may have any interest in the reorganized corporation.³ The proposed plan of reorganization for the debtor corporation provides for the modification of the rights of creditors by scaling down the indebtedness due to the creditors, decreasing interest rates and extending maturity dates. As declared by the Supreme Court of the United States, the priority of creditors over stockholders must be preserved.⁴ It would thus be unfair and inequitable to the creditors if the plan of reorganization made no provision for the alteration or modification of the rights of the stockholders. This would be true under section 77B of the Bankruptcy Act where the plan of reorganization has been ac-

3. *Kansas City Ry. v. Cent. Union Tr. Co.*, 271 U. S. 445; 48 Harv. L. Rev. 39, 74, et seq.

4. See: *Kansas City Ry. v. Cent. Union Tr. Co.*, cited supra; *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482; *Louisville Trust Co. v. Louisville Ry. Co.*, 174 U. S. 674.

cepted by the necessary proportion of [19] creditors and stockholders, which is the fact here, even though the debtor corporation be not admittedly insolvent.

II.

The proposed plan of reorganization is both fair and equitable within the meaning of section 77B of the Bankruptcy Act.

We believe a complete answer to the contention of counsel for the objecting stockholder that subdivision 2 of paragraph G of the plan of reorganization is not fair and equitable, is the statute itself.⁵ The debtor corporation being admittedly insolvent, the plan of reorganization need not provide for the stockholders.⁶

This court should not be interested in the facts which counsel for the objecting stockholder term "peculiar" in respect to the consent of Charles C. Gardner, as executor, on behalf of the estate of Mary F. McGurn. The facts were most explicitly testified to by Charles C. Gardner at the hearing before Judge Burton J. Wyman, special master, on December 30, 1935. Charles C. Gardner testified that he approved of the plan of reorganization as the only feasible means or chance of salvaging some-

5. See Bankruptcy Act, sec. 77B, subd. (e) (1), quoted in note 1, *supra*, and see also sec. 77B, subd. (f) (1): " * * * the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible; * * *."

6. See notes 1 and 2, *supra*.

thing from the assets of the corporation for the stockholders and that he willingly consented to the plan on behalf of the estate of Mary F. McGurn, and further, that he obtained an order of the probate court authorizing his consent as such executor. In view of the cases decided by the [20] Supreme Court of the United States,⁷ the interrogatories of counsel for the objecting stockholder,

“Why should this supposed extra reward be taken out of the pockets of the stockholders? Why not take some of this supposed reward from the security held by the Bank of California?”⁸

obviously need no answering argument. A reference to the decisions referred to in notes 3 and 4, *supra*, of this brief will disclose to counsel for the objecting stockholder that even the rights of unsecured creditors must be protected before the rights of stockholders. A reading of subdivision (f) (1) of section 77B of the Bankruptcy Act, quoted in note 5, *supra*, illustrates the fact that creditors and stockholders are considered as separate *classes*. Under the decisions of the Supreme Court of the United States, the classes of creditors must be considered before the classes of stockholders, and that is exactly what is done in the plan of reorganization. The conclusive fact is that the corporation is admitted insolvent and the stockholders no longer

7. See notes 3 and 4, *supra*.

8. Brief of Harold M. F. Behneman, p. 5.

have any equity in the assets of the corporation. How, then, can it be said, as does counsel for the objecting stockholder, that the reward which it has anticipated may be paid to the managing directors from the 50 per cent of the shares of stock surrendered to the board of directors, in accordance with subdivision 2 of paragraph G of the proposed plan of reorganization, is "taken out of the pockets of the stockholders"? Counsel for the objecting stockholder have admitted that the stock may be taken away absolutely. That is in effect what is done with respect to the 50 per cent of the shares of the stock by subdivision [21] 2 of paragraph G of the plan of reorganization. The fact that the plan goes a step farther and makes provision for the redistribution of that stock in the future should be of no concern to the stockholders. Certainly, if the plan had provided for the surrender of the 50 per cent of the shares of the stock to the treasury of the corporation, and then later the board of directors reissued those shares of stock for the purposes set forth in subdivision 2 of paragraph G of the plan of reorganization, there could be no valid objection from the stockholders. Therefore, the provision for the redistribution of the 50 per cent of the shares of stock before the surrender of the stock by the stockholders is, we submit, no valid or any reason for vitiating subdivision 2 of paragraph G of the plan.

Counsel for the objecting stockholder make the statement, "* * * we submit that they should be

rewarded from the assets of the company.”⁹ That is exactly what will be accomplished by the reward of part of the shares of stock if the corporation is so rehabilitated that the stock will become of some value, for then the stock will represent a certain interest in the assets of the corporation. That the proponents of the plan have made provision for return of 50 per cent of the stock to the stockholders “Upon the expiration of 5 years and the payment in full of the extended obligations, * * *”¹⁰ is evidence of the fact that the plan is fair and equitable from the viewpoint of the stockholders as well as the creditors. [22]

Conclusion

From the foregoing we conclude the following:

1. The language of subdivision (b), paragraph (2), of section 77B of the Bankruptcy Act, is clear and unambiguous in providing that the plan of reorganization may include provisions modifying or altering the rights of stockholders, and the abolition of rights of stockholders is a modification or alteration within the meaning of the statute.
2. Where the corporation is insolvent, the rights of stockholders may be entirely disregarded and no provision made for them in the reorganization of the corporation.
3. If the judge determines either that the debtor

9. Brief of Harold M. F. Behneman, p. 5.

10. Paragraph G, subdivision 1, of the proposed plan of reorganization.

is insolvent or that the interests of a stockholder or stockholders will not be affected by the plan of reorganization, the plan need not be accepted in writing in compliance with section 77B of the Bankruptcy Act and may be confirmed by the court although no provision is made for the stockholders.

4. If the plan of reorganization has been accepted by the necessary proportion of creditors and stockholders, as provided by section 77B of the Bankruptcy Act, the plan should be confirmed by the court over the objection of a minority stockholder if it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible.

It is respectfully submitted that the objection of the minority stockholder to the plan of reorganization presented to this court is unsupported in fact and law, that the proposed plan of reorganization of the debtor corporation is fair and equitable [23] within the meaning of section 77B of the Bankruptcy Act, and should be confirmed by this court.

Dated: January 11, 1936.

PILLSBURY, MADISON &
SUTRO

MARSHALL P. MADISON
GERALD S. LEVIN

Attorneys for Petitioning Creditors

Admission of Service

[Endorsed]: Filed with Special Master Jan. 11, 1936.

[Endorsed]: Filed with Clerk Feb. 19, 1936. [24]

[Title of District Court and Cause.—No. 25937-S.]

REPLY OF HAROLD M. F. BEHNEMAN TO
BRIEF OF PETITIONING CREDITORS
ON PLAN OF REORGANIZATION

Petitioning creditors state that Leo D. Byrne, Esq., of counsel for the objecting stockholder, conceded before Judge W. A. Beasly, as Special Master, on October 22, 1935, that the plan of reorganization might take away the stock of the stockholders absolutely and that it appears too obvious for argument that if the rights of stockholders may be entirely destroyed, the rights may be changed to a limited degree. We respectfully submit that Mr. Byrne made no such concession. He stated that in his opinion stockholders might be compelled to surrender fifty per cent of their stock to the treasury but that is quite a different thing than in any way admitting that fifty per cent might be taken away from one stockholder and given to some newcomer.

[25]

The decisions which petitioning creditors cite, especially the case of Silberkraus, 250 N. Y. 242, illustrates exactly the soundness of our contention. Those cases held, as we are contending, that the rights of stockholders are altered by taking away preferential rights or modifying the shares in some way. Again we say that is quite a different thing than taking away the stock from A and giving it to B.

The point made by petitioning creditors that 77b provides:

“The Judge shall confirm the plan if satisfied that it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible.”

This in no way alters the fact that the only plan which the court can approve is one which is set forth in 77b, and the fact that the corporation is insolvent has nothing whatever to do with the question. The stock may have some value and the very purpose of the act for corporate reorganization is an act for the benefit of the debtor. If it were merely an act for the benefit of creditors ordinary bankruptcy should have been pursued. That section of the Act, Subdivision (e) (1), provides that the only significance of the insolvency of the debtor is that the acceptance shall not be requisite to a confirmation of the plan. That question has no bearing upon the proposition that the only plan of reorganization which the court can confirm is the plan set forth in the act and this, so far as the stockholders are concerned, “may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character or otherwise.”

We therefore submit that the rights of stockholders are not altered or modified by compelling one stockholder to give his [26] stock to some newcomer. The rights of stockholders are only altered

or modified by the altering or modifying of the security itself.

Dated: January 13th, 1936.

Respectfully submitted,

BYRNE, LAMSON & JORDAN

Attorneys for Objecting Stockholder, Harold M. F. Behneman

Receipt of a copy of the within Reply of Harold M. F. Behneman to Brief of Petitioning Creditors on Plan of Reorganization is hereby acknowledged this day of January, 1936.

.....
Attorneys for Petitioning Creditors.

[Endorsed]: Filed with Special Master Jan. 14, 1936.

[Endorsed]: Filed with Clerk Feb. 19, 1936. [27]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 10th day of March, in the year of our Lord one thousand nine hundred and forty-one.

Present: the Honorable A. F. St. Sure, D. J.

[Title of Cause.—No. 25937.]

This matter came on regularly this day for hearing of motion to stay proceedings. Paul S. Jordan, Esq., and Leo D. Byrne, Esq., appeared specially for Respondents. Harold M. F. Behneman, Esq., Gladys A. Shores, Kenneth Ferguson, Esq., and Gerald S. Levin, Esq., appearing as Attorneys for Petitioner, Hendy Realization Company. After hearing the Attorneys, It Is Ordered that said motion to stay proceedings be and the same is hereby referred to Burton J. Wyman, Esq., as Special Master. [28]

[Title of District Court and Cause—No. 25937-S.]

ORDER AMENDING ORDER OF MARCH 3,
1941, AND EXTENDING TIME FOR FIL-
ING OF SPECIAL MASTER'S REPORT
AND HEARING THEREON.

Good cause appearing therefor;

It is hereby ordered, adjudged, and decreed that the prior [29] Order of this court dated March 3, 1941, fixing time for hearing of petition, appointing Special Master, and referring petition and other matters to Special Master be and the same is hereby amended so as to provide that the Special Mas-

ter make his written report to this court as heretofore and in Paragraph 2 of said Order of March 3, 1941 provided on or before March 29, 1941; and that the time for the filing of the written report of said Special Master, as heretofore ordered, be and the same is hereby extended from March 22, 1941, to March 29, 1941;

And it is further ordered, adjudged, and decreed that the hearing upon said petition, together with said report of said Special Master, come on for hearing before this court on Monday, March 31, 1941, at the hour of ten o'clock A. M., and that the time of such hearing is hereby accordingly extended.

And it is further ordered, adjudged, and decreed that in all other respects said Order dated March 3, 1941, shall remain in full force and effect; and that a copy of this Order need be served only upon Byrne, Lamson & Jordan, attorneys for Harold M. F. Behneman and Gladys M. Shores, respondents named in said petition.

Dated: March 25, 1941.

A. F. ST. SURE

Judge of the District Court

The foregoing Order having been examined by me, it is respectfully recommended that the same be made.

Dated: March 25, 1941.

BURTON J. WYMAN

Special Master.

[Endorsed]: Filed Mar. 25, 1941. [30]

District Court of the United States
Northern District of California
Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 7th day of April, in the year of our Lord one thousand nine hundred and forty-one.

Present: the Honorable A. F. St. Sure, D. J.

[Title of Cause—No. 25937. In Bankruptcy.]

This matter came on regularly this day for hearing on Special Master's certificate on petition for restraining order. It was stipulated by and between Paul S. Jordan, Esq., and Kenneth Ferguson, Esq., that all matters relating to the Petition to stay proceedings herein and the Civil Action No. 21792, Shores vs. Hendy Realization Co., are now before this Court and should be consolidated for trial. After hearing the Attorneys, It Is Ordered that said stipulation be approved and that Respondent herein have ten (10) days within which time to file an Answer to the Motion to stay proceedings. [31]

District Court of the United States
Northern District of California
Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern

District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 7th day of April, in the year of our Lord one thousand nine hundred and forty-one.

Present: the Honorable A. F. St. Sure, D. J.

[Title of District Court and Cause—No. 21792-S.
Civil.]

Paul S. Jordan, Esq., appearing as attorney for plaintiff, and Kenneth Ferguson, Esq., appearing as attorney for defendant. After hearing the attorneys, it is Ordered that the motion to dismiss and the motion for more definite statement each be denied. Defendant allowed ten (10) days to answer. It was stipulated between the parties that all matters relating to the motion to stay proceedings in Bankruptcy case No. 25937, In the Matter of Joshua Hendy Iron Works, etc., Debtor, and this action are now before the Court and should be consolidated for hearing. It is Ordered that said stipulation be approved. [32]

[Title of District Court and Cause—No. 25937-S
and No. 21792-S.]

MOTION TO REQUIRE APPELLANTS TO
FILE REPORTER'S TRANSCRIPT; AND
TO DIRECT THE CLERK AS TO THE
CERTIFICATION AND TRANSMITTAL
OF A PROPER RECORD ON APPEAL.

Notice of Motion and Memorandum of Points and
Authorities. [33]

To Honorable A. F. St. Sure, District Judge:

Appellees (Debtor, Petitioners, and Defendants,
above named) hereby move the above entitled Court
as follows:

1. That this Court make its order requiring appellants to furnish and file two copies of the reporter's transcript made and taken at the trial of the above entitled consolidated proceedings, containing all of the evidence and proceedings had at said trial; as designated in paragraph 11 of Appellees' Designation of Additional Contents of Record on Appeal, on file herein.

2. That this Court make its order prohibiting the Clerk of this Court from certifying or transmitting to the appellate court a record on appeal containing only those portions of the record or proceedings designated for inclusion by appellants and omitting all or any part of the additional portions of the record, proceedings, and evidence designated by appellees.

3. That this Court make its order directing the

Clerk of this Court to prepare, certify, and transmit to the appellate court a true copy of the matter designated by the parties herein, including the additional portions of the record, proceedings, and evidence designated by appellees in Appellees' Designation of Additional Contents of Record on Appeal, on file herein, upon appellants making such arrangements for payment or security for payment of the costs of such preparation, certification, and transmittal, as may be satisfactory to the Clerk of this Court.

This motion will be made upon the ground that the filing of copies of the reporter's transcript and the certification and transmittal of the additional portions of the record, proceedings, and evidence designated by appellees are required by law; and that, unless so ordered, the appellants will not file said copies of the reporter's transcript, and the Clerk will prepare, [34] certify, and transmit a partial, incomplete, and improper record on appeal to the appellate court.

This motion will be based upon this motion, the notice of motion, affidavit and memorandum of points and authorities attached hereto, and all of the records, files, and proceedings on file and had in the above entitled consolidated proceedings.

Dated: January 13th, 1942.

STANLEY PEDDER AND
KENNETH FERGUSON
PILLSBURY, MADISON &
SUTRO
LONG & LEVIT [35]

NOTICE OF MOTION.

To Gladys M. Shores and Harold M. F. Behneman,
Appellants, and to Messrs. Byrne, Lamson &
Jordan, and Paul S. Jordan, Esq., their at-
torneys:

Please take notice, that the undersigned will bring the foregoing Motion on for hearing before the above entitled Court at its Courtroom on the third floor of the Post Office Building at 7th and Mission Street, San Francisco, California, on Monday, the 19th day of January, 1942, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard.

Dated: January 13th, 1942.

STANLEY PEDDER AND
KENNETH FERGUSON
PILLSBURY, MADISON &
SUTRO
LONG & LEVIT [36]

MEMORANDUM OF POINTS AND
AUTHORITIES.

In support of the foregoing Motion, the undersigned refer to the following points and authorities:

1. Appellants are required to furnish and file two copies of the reporter's transcript of the trial;

and if they fail to do so the Court on motion may require them to do so.

Rules of Civil Procedure, Rule 75 (b).

2. The Clerk is required to transmit to the appellate court a true copy of the matter designated by appellees as well as by appellants; appellants may not refuse to pay the cost of preparation and certification of matter designated by appellees, and thereby procure a record on appeal consisting only of the matter designated by appellants.

Rules of Civil Procedure, Rule 73, 76;

O'Brien, Manual of Federal Appellate Procedure (3d ed.) pages 48, 50, 51-2, 81;

Amerlux Steel Corp. v. Johnson Line (CCA 9), 33 F2 70, 71;

28 USCA sec. 832.

STANLEY PEDDER AND
KENNETH FERGUSON
PILLSBURY, MADISON &
SUTRO
LONG & LEVIT

[Endorsed]: Filed Jan. 13, 1942. [37]

[Title of District Court and Cause—No. 25937-S
and No. 21792-S.]

AFFIDAVIT IN SUPPORT OF MOTION TO
REQUIRE APPELLANTS TO FILE RE-
PORTER'S TRANSCRIPT; AND TO DI-
RECT THE CLERK AS TO THE CERTI-
FICATION AND TRANSMITTAL OF A
PROPER RECORD ON APPEAL. [38]

State of California,
City and County of San Francisco—ss.

Bert W. Levit, being duly sworn, deposes and
says:

That he is an attorney at law duly licensed to
practice in all of the courts of the State of Cali-
fornia and a member of the bar of the above en-
titled Court; that he is a member of the law firm
of Long & Levit, one of the attorneys of record for
appellees herein; that he makes this affidavit on
behalf of appellees for the reason that the facts
herein stated are within his personal knowledge
and are better known to him than to the appellees.

That after the filing of Appellees' Designation of
Additional Contents of Record on Appeal herein,
and on January 8, 1942, affiant received by mail
copy of a letter dated January 7, 1942, written by
appellants' attorneys of record to the Clerk of
this Court; that affiant is informed and believes
and therefore alleges that the original of said letter
was received by said Clerk on January 8, 1942;

that a copy of said letter is attached hereto, marked Exhibit "A" and made a part hereof;

That upon receiving said letter, affiant telephoned said Clerk and advised him that appellees wholly disagree with the procedure outlined therein and controverted the right of appellants to take or maintain the position therein adopted; said Clerk then suggested that affiant write him a letter stating appellees' position, and stated that upon receiving the same he (said Clerk) would further communicate with appellants' attorneys;

That thereupon, and on January 8, 1942, affiant addressed a letter to said Clerk in words and figures as set forth in Exhibit "B" attached hereto and made a part hereof; that on said day a copy of said letter was mailed to appellants' attorneys; [39]

That affiant heard nothing further until January 12, 1942, and on said day affiant received by mail copy of a letter dated January 10, 1942, written by appellants' attorneys of record to said Clerk; that affiant is informed and believes and therefore alleges that the original of said letter was received by said Clerk on January 12, 1942; that a copy of said letter is attached hereto, marked Exhibit "C" and made a part hereof;

That upon receiving said letter, affiant telephoned said Clerk and inquired of him whether said letter correctly recited the procedure which said Clerk intended to follow, unless otherwise instructed by the Court; that said Clerk replied in the affirmative;

That affiant is informed and believes and there-

fore alleges that appellants have not, as required by Rule 75 (b) of the Rules of Civil Procedure, filed herein two or any copies of any portion of the reporter's transcript made and taken at the trial of the above entitled consolidated proceedings, containing the evidence and proceedings had at said trial, and will continue to refuse and fail to do so unless required to do so by the Court.

That affiant and appellees are informed and believe that the Clerk of this Court does not intend to transmit to the appellate court a true copy of the matter designated by the parties for inclusion in the record on appeal, as required by Rule 75 (g) of the Rules of Civil Procedure; but intends, unless otherwise ordered by the Court, to permit appellants to select such portions of the matter designated by the parties for inclusion in the record on appeal, as appellants may see fit to select, and to then certify such selected portions and transmit the same to the appellate court as the record on appeal herein. [40]

Further affiant sayeth not.

BERT W. LEVIT

Subscribed and sworn to before me, this 13th day
of January, 1942.

(Seal)

KATHRYN E. STONE

Notary Public, In and for the
City and County of San Fran-
cisco, State of California. [41]

EXHIBIT "A"

Byrne, Lamson & Jordan
Attorneys at Law
1249 Russ Building
San Francisco, Calif.

Jan. 7, 1942.

Mr. Walter B. Maling
Clerk of the United States District Court
United States Post Office Building
Seventh and Mission Streets
San Francisco, California

Re: The Joshua Hendy Iron Works, Debtor;
Hendy Realization Co., et al vs. Behne-
man, et al, Your No. 25937-S;
Shores vs. Hendy Realization Co., et al,
Your No. 21792-S

Dear Sir:

You are hereby requested to proceed with preparation of the transcript of the record on appeal in the above entitled consolidated proceedings now pending in the United States District Court for the Northern District of California, incorporating therein only those items heretofore designated by appellants Behneman and Shores in their "Designation of Contents of Record on Appeal" filed in your office on December 23, 1941. When preparation of said transcript has been completed, kindly affix your certificate as to the correctness thereof and then file the same with the Circuit Court of Appeals for the Ninth Circuit, to which the appeal has been taken. According to our records, the rec-

ord on appeal should be filed with the said Circuit Court not later than January 24, 1942.

With reference to "Appellees' Designation of Additional Contents of Record on Appeal", served and filed by appellees on January 2, 1942, we request that you include a copy thereof in the record on appeal; otherwise it is not our wish that you include in the record on appeal any of the items specified by appellees therein except insofar as they may be duplications of items designated by appellants. Appellants do not consider the portions of the record designated by appellees to be in any way pertinent or necessary to this appeal, and are therefore not willing to assume the cost of their inclusion in the appeal record.

If preparation of the record on appeal as designated by appellants cannot be completed for filing in the Circuit Court prior to January 24, 1942, kindly advise us amply in advance of that date so that we may arrange for an enlargement of the time for filing.

A copy of this letter is being sent to counsel for appellees in order that they may be fully advised in the premises.

Thanking you for your cooperation in this matter, we are

Very truly yours,

BYRNE, LAMSON & JORDAN
By PAUL S. JORDAN

Attorneys for Appellants Behne-
man and Shores [42]

EXHIBIT "B"

Long & Levit
Merchants Exchange
San Francisco

Walter B. Maling, Esq.,
Clerk, United States District Court,
Post Office Building,
San Francisco, California.

Re: File #1240—Joshua Hendy Iron Works,
etc.; Actions No. 21792-S and No.
25937-S.

Dear Sir:

This will confirm our telephone conversation of this morning relative to letter dated January 7th addressed to you by Messrs. Byrne, Lamson & Jordan and carboned to us.

It is our opinion that Rule 75 of the Rules of Civil Procedure is entirely clear as to the right of an appellee to designate additional portions of the record and proceedings, not included in the designation filed by the appellant; and as to the obligation of the appellant to pay the cost thereof.

It is not within the province of an appellant to determine that he will proceed with the appeal upon a record made up as designated by him and omitting the designation of appellee. It would seem that the aforesaid letter is wholly irregular, and should be disregarded by you.

Paragraph (g) of Rule 75 provides in part:

“The clerk of the district court . . . *shall* transmit to the appellate court a true copy of the matter *designated by the parties* . . .”*

It seems clear that, under this Rule, you are not empowered to transmit to the appellate court the matter designated by appellant alone. It may be, that if appellant refuses to pay the necessary costs of the record “designated by the parties”, you would not be obliged to prepare or transmit any record whatever. But we do not believe that it would be proper for you to transmit a partial record where both parties have filed designations, as here.

We respectfully submit these comments for your consideration. Unless we hear from you to the contrary, we shall assume that you agree with our position. We are sending a copy of this letter to Messrs. Byrne, Lamson & Jordan.

Yours very truly,

LONG & LEVIT [43]

*Underscored in original copy.

EXHIBIT "C"

Byrne, Lamson & Jordan
Attorneys at Law
1249 Russ Building
San Francisco, Calif.

Jan. 10, 1942

Walter B. Maling, Esq.
Clerk of the United States District Court
United States Post Office Building
Seventh and Mission Streets,
San Francisco, California

Re: The Joshua Hendy Iron Works, etc.
Your Actions No. 25937-S and 21792-S

Dear Sir:

This will confirm our conversation of yesterday regarding preparation of the record on appeal in the above entitled consolidated proceedings. Appellants Shores and Behneman, for the reasons already stated to you in our letter of January 7, 1942, will not pay for the cost of including in the record on appeal those portions of the record designated by appellees. It is our understanding that you will accordingly prepare, certify and file in the Circuit Court only those portions of the record heretofore designated by appellants (but including "Appellees' Designation of Additional Contents of Record on Appeal" filed on January 2, 1942), and that this will be done prior to January 24, 1942. If for any reason you require additional time, please advise

us sufficiently in advance of the last mentioned date to enable us to apply for a time extension.

A copy of this letter is being sent to counsel for appellees.

Thanking you for your cooperation in this matter, we are

Very truly yours,

BYRNE, LAMSON & JORDAN
By PAUL S. JORDAN

[Endorsed]: Filed Jan. 13, 1942. [44]

[Title of District Court and Cause.]

APPELLEES' DESIGNATION OF ADDITIONAL CONTENTS TO BE SUPPLEMENTALLY CERTIFIED AS A PART OF THE RECORD ON APPEAL

Pursuant to the order duly given or made by the United States Circuit Court of Appeals for the Ninth Circuit on May 18, 1942, appellees hereby designate that the following additional portions of the record, proceedings and evidence in the District Court be included in the record on appeal and be, by the Clerk of the District Court, supplementally certified up as a part of and in addition to the matters already certified as the record on appeal in the above entitled consolidated causes:

- (1) The following additional items accompanying the "Certificate and Report of Special Master Relative to the Confirmation of Plan

of Reorganization and Directing Reorganization of Debtor Corporation,” dated February 19, 1936, on file in District Court Action No. 25937-S, and designated in said Certificate and Report as “Papers Handed Up Herewith”:

- (a) Brief of Harold M. F. Behneman on Objections to Plan of Reorganization, being No. 2 in said Certificate;
- (b) Memorandum of Points and Authorities of W. R. Bassick, Trustee, as Amicus Curiae, on Further Hearing Upon Proposed Plan of Reorganization, being No. 3 in said Certificate;
- (c) Brief of Petitioning Creditors in Support of the Proposed Plan of Reorganization and in Reply to the Brief of Harold M. F. Behneman, being No. 4 in said Certificate; and
- (d) Reply of Harold M. F. Behneman to Brief of Petitioning Creditors on Plan of Reorganization, being No. 5 in said Certificate;

(2) Minute Order in District Court Action No. 25937-S dated March 10, 1941, referring “Motion to Stay Proceedings” to the Honorable Burton J. Wyman, as Special Master;

(3) Order in District Court Action No. 25937-S dated March 25, 1941, “Amending Order of March 3, 1941, and Extending [45] Time for Filing of Special Master’s Report and Hearing Thereon”;

(4) Minute Order dated April 7, 1941, in District Court Action No. 25937-S, and identical Minute Order dated April 7, 1941, in District Court Action No. 21792-S, relating to, setting forth, and approving the stipulation of counsel that said District Court Actions should be forthwith consolidated;

(5) Motion in consolidated District Court Actions No. 25937-S and No. 21792-S to "Require Appellants to File Reporter's Transcript; and to Direct the Clerk as to the Certification and Transmittal of a Proper Record on Appeal," together with the Notice of Hearing said Motion, and the Affidavit and Memorandum of Points and Authorities in support thereof.

Dated: San Francisco, California, May 27, 1942.

STANLEY PEDDER AND
KENNETH FERGUSON
PILLSBURY, MADISON &
SUTRO
LONG & LEVIT

Attorneys for Appellees

(Receipt of service)

[Endorsed]: Filed May 28, 1942. [46]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 46 pages, numbered from 1 to 46, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cases of The Joshua Hendy Iron Works, etc., Debtor, Hendy Realization Co. etc., et al, Petitioners, vs. Harold M. F. Behneman, et al, Respondents. No. 25937-S. and Gladys M. Shores, Plaintiff, vs. Hendy Realization Co. etc., et al, Defendants. No. 21792-S. Nos. 25937-S, 21792-S. as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of five dollars & forty-five cents (\$5.45) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 28th day of May A. D. 1942.

WALTER B. MALING

Clerk

(Seal)

WM. J. CROSBY

Deputy Clerk [47]

[Endorsed]: No. 10085. United States Circuit Court of Appeals for the Ninth Circuit. Gladys M. Shores and Harold M. F. Behneman, Appellants, vs. Hendy Realization Co., a corporation, (formerly The Joshua Hendy Iron Works), A. J. Mayman, C. B. Moores, E. Price, A. E. Webber and W. R. Bassick, individually and as the Directors of Hendy Realization Co., Elmer M. Hyland and Morris Levit, Appellees. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 29, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 10,085

In the Matter of THE JOSHUA HENDY IRON
WORKS (whose name has been changed to
Hendy Realization Co.), a corporation,
Debtor.

HENDY REALIZATION CO. (formerly The
Joshua Hendy Iron Works), a corporation,
A. J. MAYMAN, C. B. MOORES, E. H.
PRICE, W. R. BASSICK, E. M. HYLAND
and MORRIS LEVIT,
Petitioners,

vs.

HAROLD M. F. BEHNEMAN and GLADYS M.
SHORES,
Respondents.

GLADYS M. SHORES,
Plaintiff,

vs.

HENDY REALIZATION CO., a corporation (for-
merly The Joshua Hendy Iron Works), A. J.
MAYMAN, C. B. MOORES, E. PRICE, A. E.
WEBBER and W. R. BASSICK, individually
and as the Directors of Hendy Realization Co.,
ELMER M. HYLAND, MORRIS LEVIT,
FIRST DOE, SECOND DOE and THIRD
DOE,
Defendants.

APPELLANTS' STATEMENT OF POINTS ON
WHICH THEY INTEND TO RELY ON
THIS APPEAL, AND DESIGNATION OF
PARTS OF THE RECORD TO BE
PRINTED, WHICH APPELLANTS THINK
ARE NECESSARY FOR THE CONSID-
ERATION THEREOF

Appellants' Statement of Points

Appellants Gladys M. Shores and Harold M. F. Behneman herewith state the points on which they intend to rely on this appeal as follows:

1. That the United States District Court for the Northern District of California, Southern Division, was, and is, without jurisdiction over the entire subject matter and issues involved in the above entitled consolidated causes, and that said court accordingly erred in the making and entering of said judgment herein on November 15, 1941;

2. That the motion of appellant Gladys M. Shores to remand to the Superior Court of the State of California, in and for the City and County of San Francisco, the above cause entitled "Gladys M. Shores, plaintiff vs. Hendy Realization Co., a corporation, et al, defendants", and numbered 21792-S in said United States District Court, should have been granted for the reason that said suit is not one arising under the Constitution or laws of the United States and, accordingly, does not involve a "Federal question" (that said suit was one arising under the Constitution or laws of the United States constituted the sole ground urged by ap-

pellees for removal thereof from said Superior Court to said United States District Court); and for the further reason that said suit is not one within the original and exclusive jurisdiction of said United States District Court, and that jurisdiction thereof had already attached in said Superior Court prior to its removal to said United States District Court upon the petition of appellees. For said reasons, the motion of appellant Gladys M. Shores to remand said suit to said Superior Court should accordingly have been granted, and the said United States District Court erred in denying the same and in making and entering said judgment filed herein on November 15, 1941;

3. That the motion of appellants Gladys M. Shores and Harold M. F. Behneman to dismiss appellees' petitions filed in said United States District Court on February 19, 1941 (see clerk's transcript Volume I, page 54), and on March 11, 1941 (see clerk's transcript Volume I, page 85), in the above cause entitled "In the Matter of The Joshua Hendy Iron Works (whose name has been changed to Hendy Realization Co.), a corporation, Debtor; Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, et al, Petitioners vs. Harold M. F. Behneman and Gladys M. Shores, Respondents", and numbered 25937-S in said United States District Court, and to vacate the restraining order of said United States District Court given and made on March 11, 1941 (see clerk's transcript Volume 1, page 90), should have been granted for the reason that said United States District Court

lacks jurisdiction over the issues and subject matter referred to and described in said above mentioned petitions, or to grant the relief prayed for in said petitions, or either of them. Said United States District Court accordingly erred in denying appellants' said motion to dismiss said petitions in its said judgment given, made and entered on November 15, 1941;

4. That the individual appellees are not proper parties to the above cause entitled "In the Matter of The Joshua Hendy Iron Works (whose name has been changed to Hendy Realization Co.), a corporation, Debtor; Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, et al, Petitioners vs. Harold M. F. Behneman and Gladys M. Shores, Respondents", and numbered 25937-S in said United States District Court, for the reason that none of them have intervened in said cause in accordance with Rule 24 of the Rules of Civil Procedure for the District Courts of the United States.

Appellants' Designation of Parts
of the Record to be Printed

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Dated: March 24th, 1942.

BYRNE, LAMSON & JORDAN
PAUL S. JORDAN

Attorneys for appellants Gladys
M. Shores and Harold M. F.
Behneman

1249 Russ Building
San Francisco, California

Receipt of a copy of the foregoing statement of points and designation of parts is acknowledged this 24th day of March.

PEDDER & FERGUSON
PILLSBURY, MADISON &
SUTRO
LONG & LEVIT

Attorneys for appellees

[Endorsed]: Filed Mar. 24, 1942. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND ORDER THAT CERTAIN
EXHIBITS NEED NOT BE PRINTED.

It Is Hereby Stipulated by and between appellants and appellees that all exhibits admitted in evidence during the trial of the above entitled consolidated causes in the District Court and transmitted to and filed with the Clerk of this Circuit Court of Appeals in original form, need not be printed as a part of the record herein but may be considered by this Court in their original form, for the reason that said exhibits are quite voluminous and the printing thereof would be impractical.

Dated: San Francisco, California, April 2nd,
1942.

BYRNE, LAMSON & JORDAN
PAUL S. JORDAN

By PAUL S. JORDAN

Attorneys for Appellants.

MARSHALL P. MADISON,
GERALD S. LEVIN,
STANLEY PEDDER,
KENNETH FERGUSON,
BERT W. LEVIT,
WILLIAM H. LEVIT,

By BERT W. LEVIT,

Attorneys for Appellees.

So Ordered:

FRANCES A. GARRECHT,

United States Circuit Judge.

[Endorsed]: Filed Apr. 2, 1942, Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]
APPELLANTS' SUPPLEMENTAL STATE-
MENT OF POINTS ON WHICH THEY
INTEND TO RELY ON THIS APPEAL.

Appellants Gladys M. Shores and Harold M. F. Behneman, pursuant to leave heretofore granted by this court, herewith state the following further points on which they intend to rely on this appeal, in addition to the points already set forth in their original statement on file herein.

In deciding these consolidated causes on their merits, as set forth in the final judgment entered on November 15, 1941, the United States District Court for the Northern District of California, Southern Division, erred in the following particulars, namely:

1. In finding and holding that on and prior to both November 15, 1940 and December 20, 1940 the affairs of appellee Hendy Realization Co. had been successfully rehabilitated within the meaning of that term as used in Paragraph 6G 2 of the Hendy Plan of Reorganization;

2. In finding and holding that appellees Bassick, Hyland and Levit, as managing officers of appellee Hendy Realization Co., were entitled to the 2212 $\frac{1}{2}$ shares of capital stock of appellee Hendy Realization Co. distributed to them on December 20, 1940 by appellees Mayman, Moores, Price and Bassick, and by A. E. Webber (now deceased), as the then Directors of appellee Hendy Realization Co.;

3. In finding and holding that appellees Bassick, Hyland and Levit, as managing officers of appellee Hendy Realization Co., had been inadequately compensated for the services rendered by them to said appellee corporation between March 24, 1936 and November 15, 1940, and in finding and holding that the payment of additional compensation or bonuses by said appellee corporation to appellees Bassick, Hyland and Levit on December 4, 1940 was proper. With reference to this point, appellants contend that the propriety or impropriety of any such additional compensation or bonus payments made to

said last named appellees is not an issue in either of these consolidated causes;

4. In holding that said appellants be permanently restrained and enjoined from interfering with or attacking, through court proceedings or otherwise, the additional compensation or bonus payments made by appellee Hendy Realization Co. to appellees Bassick, Hyland and Levit on December 4, 1940. With reference to this point, appellants contend that the propriety or impropriety of any such additional compensation or bonus payments made to said last named appellees is not an issue in either of these consolidated causes and, accordingly, that any reference to the same in the final judgment entered herein was improper.

Dated: April 23, 1942.

BYRNE, LAMSON & JORDAN,
PAUL A. JORDAN,

Attorneys for appellants Gladys
M. Shores and Harold M. F.
Behneman.

Receipt of a copy of the foregoing supplemental statement is acknowledged this 23rd day of April, 1942.

MARSHALL P. MADISON,
GERALD S. LEVIN,
STANLEY PEDDER,
KENNETH FERGUSON,
BERT W. LEVIT,
WILLIAM H. LEVIT,

By BERT W. LEVIT,
Attorneys for appellees.

[Endorsed]: Filed Apr. 29, 1942, Paul P.
O'Brien, Clerk.

At a stated Term, to wit: The October Term 1941, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the eighteenth day of May in the year of our Lord one thousand nine hundred and forty-two.

Present:

Honorable Francis A. Garrecht, Circuit Judge,
Presiding,

Honorable Clifton Mathews, Circuit Judge,
Honorable Bert Emory Haney, Circuit Judge.

No. 10085

GLADYS M. SHORES, et al.,

Appellant,

vs

HENDY REALIZATION CO., a corporation, et al.,
Appellees.

ORDER GRANTING MOTION FOR ENLARGEMENT OF RECORD.

Ordered motion of appellees, filed May 8, 1942, for enlargement of the transcript of record herein, and appellants' response to such motion, filed May 15, 1942, orally presented by Mr. Kenneth Ferguson, counsel for appellees, in support of the motion, and by Mr. Paul A. Jordan, counsel for appellants, in opposition thereto, and submitted to the Court for consideration and decision.

Upon consideration thereof, Further Ordered that the motion for enlargement of the transcript of record herein be, and hereby is granted, and that a certified copy of the documents listed in appellees' motion be filed as a supplemental transcript of record in this cause.

It Is Further Ordered that the cost of certification and expense of printing of such supplemental transcript of record shall be borne by the appellees initially; the taxation of such costs to abide the disposition of the cause by this Court, and the further order of this Court.

No. 10,085

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 3

GLADYS M. SHORES and HAROLD M. F.
BEHNEMAN,

Appellants,

VS.

HENDY REALIZATION Co., a corporation
(formerly the Joshua Hendy Iron
Works), A. J. MAYMAN, C. B. MOORES,
E. PRICE, A. E. WEBBER and W. R.
BASSICK, individually and as the Di-
rectors of Hendy Realization Co.,
ELMER M. HYLAND and MORRIS LEVIT,
Appellees.

BRIEF FOR APPELLANTS.

BYRNE, LAMSON & JORDAN,
PAUL S. JORDAN,

Russ Building, San Francisco, California,

Attorneys for Appellants.

FILED

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

GLADYS M. SHORES and HAROLD M. F.
BEHNEMAN,

Appellants,

VS.

HENDY REALIZATION Co., a corporation
(formerly the Joshua Hendy Iron
Works), A. J. MAYMAN, C. B. MOORES,
E. PRICE, A. E. WEBBER and W. R.
BASSICK, individually and as the Di-
rectors of Hendy Realization Co.,
ELMER M. HYLAND and MORRIS LEVIT,
Appellees.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

This is an appeal from a final judgment of the United States District Court for the Northern District of California, Southern Division, hereafter referred to as the "District Court", made and entered in the above entitled consolidated causes on November 15, 1941 in favor of defendants and petitioners, appellees herein, and against plaintiff and respondent,

Gladys M. Shores, and respondent, Harold M. F. Behneman, appellants herein. Appellants contend, first, that said District Court was, and is, without jurisdiction over the entire subject matter and issues involved and presented in said consolidated causes; and, second, that said District Court erred in its decision on the merits.

The Shores action.

The cause entitled “Gladys M. Shores, Plaintiff vs. Hendy Realization Co., a corporation, (formerly The Joshua Hendy Iron Works), et al., Defendants” is a stockholder’s representative suit in equity for declaratory, injunctive and other equitable relief. This cause, which is hereafter referred to as the “Shores action”, was originally commenced in the Superior Court of the State of California, in and for the City and County of San Francisco, hereafter referred to as the “State Court”. The complaint in this action (Transcript, page 3) reveals the following facts:

On or about March 4, 1935 certain of the creditors of The Joshua Hendy Iron Works (whose name was later changed to Hendy Realization Co.), a California corporation, hereafter for convenience referred to as the “Hendy Co.”, petitioned the District Court for the corporate reorganization of said company under the provisions of former Section 77-B of the National Bankruptcy Act. (*U. S. C.* Title 11, former Section 207.) The proceedings thus initiated resulted in the approval and confirmation of a plan of reorganization, hereafter referred to as the “Plan”, by order of the

District Court made on March 24, 1936 (Transcript, page 201), and said Plan was thereupon carried into effect. Under the provisions of said Plan the then outstanding obligations of the Hendy Co. were reduced in amount and deferred as to payment for a period of five years, the obligations thus reduced aggregating approximately \$550,000; Paragraph 6G of this Plan provided that, in consideration of said reduction in creditors' claims and the five year extension as to payment thereof, the Hendy Co. stockholders were to deposit their shares with the company's Board of Directors; 50% of the shares so deposited were to be held in trust for five years and thereafter until the reduced and extended obligations of the Hendy Co. had been fully paid, the same then to be redelivered to said stockholders. The remaining 50% of the shares so deposited were to be held by the Board, free and clear of any claim, right, title or interest therein by the depositing stockholders, the same to be distributed by said Board, in its sole discretion, either in whole or in part, to the managing officers of the Hendy Co. "as a reward for management and the successful rehabilitation of the company's affairs". At the time of confirmation of the Hendy Plan, appellant Shores was the owner of 607 shares of Hendy Co. stock, and pursuant to said Plan she deposited her said shares with the individual appellees, Mayman, Moores, Price and Bassick, and A. E. Webber (now deceased), as the Directors of the Hendy Co., and received in return a Voting Trustee's Receipt and Certificate evidencing her ownership of 303½ shares, that is to say, 50% of her original holdings.

Since its incorporation in 1906, the Hendy Co. had been continuously engaged in the general foundry and metal products manufacturing business, with the production department thereof being conducted entirely at the manufacturing plant of the company at Sunnyvale, California. This Sunnyvale plant and the equipment therein represented the principal and all operating assets of the Hendy Co. On November 15, 1940 the said Sunnyvale plant and equipment of the Hendy Co. was sold to MacDonald & Kahn, Inc. for in excess of \$400,000, and the continuation of the Hendy Co. in its said business was thereby rendered impossible. At the time of the sale of its said plant and equipment, the Hendy Co. was still obligated for more than \$200,000 of the approximately \$550,000 of reduced and deferred obligations covered by its Plan of Reorganization. Subsequent to said sale, the said unpaid reduced and deferred obligations were paid in full, and it is alleged that such payment was made possible only through resort to the moneys derived from the sale of the company's capital assets, that is to say, its Sunnyvale plant and equipment.

Shortly prior to December 20, 1940, individual appellees Mayman, Moores, Price and Bassick, together with said A. E. Webber, as the Board of Directors of the Hendy Co. and allegedly acting pursuant to Paragraph 6G 2 of its said Plan, proceeded to distribute to appellees Bassick, Hyland and Levit, as the managing officers of the Hendy Co., all stock previously held by said Directors under Paragraph 6G 2 of the Plan, that is to say, stock representing 50% of the shares of the company outstanding on March 24, 1936 (the date

of confirmation of the Plan) and surrendered to the said Directors of the Hendy Co. by appellant Shores and the other stockholders of the company pursuant to Paragraph 6G of said Plan. On December 20, 1940 proceedings for the winding up and dissolution of the Hendy Co. were commenced, and on December 21, 1940 said Board of Directors proceeded to terminate the Voting Trust created by Paragraph 6G of the Plan and to declare a first liquidating dividend of \$45 per share in favor of appellant Shores and the other holders of the then outstanding Trustee's Receipts and Certificates of the Hendy Co. issued pursuant to Paragraph 6G 1 of the Plan. Appellees Bassick, Hyland and Levit, as the distributees of the stock previously held under Paragraph 6G 2 of the Plan, were specifically excluded from participation in this first liquidating dividend.

The complaint further alleges it to be the contention of appellees Mayman, Moores, Price and Bassick, and the said A. E. Webber, as the Directors of the Hendy Co., that, by reason of the allegations of fact mentioned above, the affairs of the Hendy Co. had been *successfully rehabilitated* on November 15, 1940, that is to say, that the sale of the Hendy Co.'s sole operating assets on the last mentioned date, under the circumstances above mentioned, constituted *successful rehabilitation* within the meaning of Paragraph 6G 2 of the Hendy Plan and, accordingly, that the distribution to appellees Bassick, Hyland and Levit, as the managing officers of the Hendy Co., of 50% of the stock deposited by the Hendy stockholders under Paragraph 6G of the Plan was fully justified, thus

entitling said last mentioned appellees to receive future liquidating dividends to be declared by the Hendy Co. upon an equal pro rata basis with appellant Shores and the other stockholders of the Hendy Co. On the other hand, the complaint alleges plaintiff Shores' contention to be that the term *successful rehabilitation*, as used in Paragraph 6G 2 of said Plan, contemplated full payment of the reduced and deferred obligations covered by said Plan *out of earnings of the Hendy Co. derived from the operation of its business as a going concern*, to the end that the capital assets thereof might be preserved for the benefit of its stockholders and the control and management of the company as a going concern ultimately returned to said stockholders; and that the term *successful rehabilitation* did not contemplate payment of the reduced and deferred obligations covered by the Plan out of proceeds of the sale of all operating capital assets and the corporate name and good will of the Hendy Co., followed by a winding up and dissolution of said company.

In the complaint it is alleged that no demand was made by appellant Shores upon appellee Hendy Realization Co. to bring said action, for the reason that the individual appellees Mayman, Moores, Price and Bassick, together with A. E. Webber, constituted the entire Board of Directors of said company and, together with appellees Hyland and Levit, were the persons against whom relief was sought, and that the making of such demand upon said appellee Directors would have been a useless and idle act; that appellee Hendy Co. had accordingly been named as a party de-

fendant in said action, and that the same was brought for and on behalf of said company and all of its stockholders other than appellees Bassick, Hyland and Levit as the holders of the shares of Hendy stock distributed to them in the manner and under the circumstances described in the complaint.

Under the prayer of this complaint, appellant Shores sought a declaration and determination of the rights and duties of the parties to said action with respect to each other under Paragraph 6G of the Hendy Plan; a declaration and determination of the rights and duties of the parties thereto with respect to disposition of the Hendy shares distributed to appellees Bassick, Hyland and Levit under the circumstances above described; and a declaration and determination of the rights and duties of the parties to said action with respect to the future disposition of all liquidating dividends subsequently declared by the Hendy Co. to its stockholders, particularly with reference to whether any such liquidating dividends should be paid on said stock distributed to appellees Bassick, Hyland and Levit, or whether payment of such future liquidating dividends should be restricted to the stockholders of the company whose shares were subjected to the Voting Trust created by Paragraph 6G 1 of the Hendy Plan; that the individual appellees be required to account for all shares of Hendy stock distributed to appellees Bassick, Hyland and Levit in the manner described in said complaint, and that all appellees be enjoined from paying from the assets of the Hendy Co. any liquidating or other dividends on Hendy shares distributed to appellees Bassick, Hyland and

Levit in the manner described in said complaint; that such stock distribution be declared illegal and void, and that appellees Bassick, Hyland and Levit be required to surrender to the Hendy Co. all shares so distributed to them, the same to be cancelled and retired to the treasury of the company.

The Shores action was removed from the State Court where it was originally commenced to the District Court on the petition of appellees. In their removal petition (Transcript, page 31 at 33, 34) the sole ground of removal urged by appellees was that "said suit is one arising out of the laws of the United States in that it involves a Federal question, to wit: the validity, effect and enforcement of the decree of said United States District Court * * * approving and confirming the Plan of Reorganization of The Joshua Hendy Iron Works (a corporation), Debtor, and ordering said reorganization of said debtor in accordance with the provisions of said Plan of Reorganization * * *". Appellant Shores thereupon moved the District Court to remand this action to the State Court, and in her motion to remand (Transcript, page 45) denied appellees' right to removal upon this ground, contending that the Shores action does not involve either the validity, effect or enforcement of the order of the District Court which originally confirmed the Hendy Plan, as urged in appellees' removal petition (Transcript, pages 31, 33), or the construction of the provisions of former Section 77-B of the National Bankruptcy Act under which the Plan was approved; in short, that no "federal question" is pre-

sented by this action. This motion to remand was subsequently denied. (Transcript, page 47.)

The Hendy reorganization proceedings.

The cause entitled “Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, A. J. Mayman, C. B. Moores, E. H. Price, W. R. Bassick, E. M. Hyland and Morris Levit, Petitioners v. Harold M. F. Behneman and Gladys M. Shores, Respondents” arises out of the above mentioned corporate reorganization proceedings involving the Hendy Co. entitled “In the Matter of The Joshua Hendy Iron Works, a corporation, Debtor”, and in connection with which the Hendy Plan was approved and carried into effect. This cause will hereafter be referred to as the “Hendy reorganization proceeding”. As previously stated, this proceeding was originally commenced in the District Court on or about March 4, 1935, and the Plan was approved and confirmed by order of the District Court dated March 24, 1936. (Transcript, page 201.) On January 27, 1937 an order denominated “Final Decree Approving and Confirming Report of Execution and Accomplishment of Confirmed Plan of Reorganization: Settling, Approving, and Confirming Final Report and Account of Trustee for Debtor: Settling and Allowing Claims, Fees, and Expenses: Discharging Trustee for Debtor: and Terminating and Closing Reorganization Proceedings” (hereafter referred to as the “final decree”) was entered by the District Court in the Hendy reorganization proceeding (Transcript, page 225), in which it was determined that the Hendy Plan had

been fully consummated and carried into effect. *There was no reservation of jurisdiction provided for by the court in said final decree with respect to any matter involved in the Plan, or with respect to any order of the court pertaining thereto.* (See Paragraph 16, Transcript, page 231.) Following entry of the final decree, no further proceedings were taken or had in the District Court in connection with the Hendy reorganization proceeding (see Certificate of clerk of the District Court, Transcript, page 152) until February 19, 1941, when there was filed in the District Court by appellees, without previous application or order permitting intervention, a petition denominated "Petition for Order Aiding, Enforcing, Effectuating and Protecting the Adjudication, Order, and Decree of the Above Entitled Court Confirming Plan of Reorganization and Directing Reorganization of Debtor Pursuant Thereto, and Preventing and Enjoining the Threatened Interference with and Defeat of Said Adjudication, Order, and Decree and the Jurisdiction of the Above Entitled Court" (Transcript, page 233), which petition (hereafter referred to as "appellees' petition of February 19, 1941") was captioned "In the Matter of The Joshua Hendy Iron Works (whose name has been changed to Hendy Realization Co.), a corporation, Debtor", followed by "Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, et al., Petitioners v. Harold M. F. Behneman and Gladys M. Shores, Respondents". This petition was numbered 25937-S, the number identifying the old Hendy reorganization proceeding. *No process was issued upon the filing of this petition, and*

no diversity of citizenship between the parties is therein alleged. In appellees' petition of February 19, 1941, which really initiated a new action under the guise of the old Hendy reorganization proceeding, it is alleged that the Shores action then pending in the State Court, as well as an identical companion action previously commenced by appellant Behneman entitled "Harold M. F. Behneman, Plaintiff, v. Hendy Realization Co., a corporation (formerly The Joshua Hendy Iron Works), A. J. Mayman, C. B. Moores, E. Price, A. E. Webber and W. R. Bassick, individually and as the Directors of Hendy Realization Co., Elmer M. Hyland and Morris Levit, Defendants", likewise then pending in the State Court (for complaint in this action see Transcript, page 338), constitute an unwarranted and improper attack upon, and an attempted interference with, the order and decree of the District Court of March 24, 1936, which approved and confirmed the Hendy Plan. Through this petition, appellees requested the District Court to permanently enjoin the further prosecution of the Shores and Behneman actions in the State Court.

On March 11, 1941 a second petition denominated "Appellees' Petition for Order Restraining and Staying Pending Actions" (hereafter referred to as "appellees' petition of March 11, 1941") was similarly filed by appellees in the old Hendy reorganization proceeding. This petition (Transcript, page 286), in addition to reaffirming the allegations of appellees' petition of February 19, 1941, also refers to another action commenced by appellant Behneman in the State Court entitled "In the Matter of the Voluntary Wind-

ing Up and Dissolution of Hendy Realization Co., a corporation'' (for complaint in this action see Transcript, page 368), through which appellant Behneman sought to obtain the supervision of the State Court over all matters pertaining to the winding up and dissolution of the Hendy Co., which was then in progress, pursuant to the provisions of Section 403 of the California Civil Code. In appellees' petition of March 11, 1941 they again pray that the further prosecution of the above described Behneman and Shores actions in the State Court be permanently enjoined, and, in addition, that further prosecution of appellant Behneman's action for State Court supervision over the winding up and dissolution of the Hendy Co. be likewise permanently enjoined.

On March 11, 1941 the District Court entered an order temporarily restraining the further prosecution of each of the State Court actions above described, and referred appellees' petitions of February 19 and March 11, 1941 to Hon. Burton J. Wyman, as Special Master, for hearing and report. (Transcript, page 281.) On March 17, 1941 appellants filed a motion to dismiss the petitions and to dissolve the temporary injunction (Transcript, page 336), the motion being made on the grounds that (1) neither of said petitions stated a claim against appellants upon which relief could be granted and (2) that said District Court was without jurisdiction over the subject matter covered thereby.

Hearings were thereupon had before the Special Master on appellees' petitions, during which appellants' motion to dismiss the same was argued. Upon

the conclusion of the hearings, the Special Master, on March 28, 1941, filed with the District Court his certificate and report (Transcript, page 293), in which it was found and concluded that the District Court had jurisdiction over the subject matter of appellees' petitions of February 19 and March 11, 1941, and in which it was recommended (1) that the temporary restraining order be continued in effect; (2) that appellants' motion to dismiss be denied; and (3) that appellants be permitted to plead to the petitions and that the same then be heard on the merits. (Transcript, page 334.)

On April 4, 1941 appellants filed their objections to the certificate and report of the Special Master (Transcript, page 371), and upon the argument thereof before the District Court it was ordered that ruling on the same would be reserved until the time of trial, and that this proceeding instituted by appellees within the old Hendy reorganization proceeding and the Shores action (appellants' motion to remand the same to the State Court having by this time been denied—Transcript, page 47) be consolidated for trial. (Transcript, page 49.) An answer was thereupon filed by appellees to the complaint in the Shores Action (Transcript, page 51), and an answer and counterclaim was filed by appellants to appellees' February 19 and March 11, 1941 petitions in the Hendy reorganization proceeding (Transcript, page 375), the counterclaim alleging in substance all matters set forth in the Shores complaint. Appellees' answer to the counterclaim was then filed (Transcript, page 403), and the consolidated causes thus brought to issue. The

ensuing trial resulted in entry of judgment in favor of appellees and against appellants in both causes. (Transcript, page 131.)

Upon the foregoing statement of pleadings and facts, and for the reasons hereafter set forth in this brief, appellants contend that *the District Court was without jurisdiction over the subject matter involved in either of the consolidated causes.*

The appellate jurisdiction of the Circuit Court of Appeals in these consolidated causes is based upon the following statutory provisions:

“The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions:

First: In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Sec. 345 of this title.”

Judicial Code, Sec. 128;

U. S. C., Title 28, Sec. 225.

No direct review of the decision of the District Court in this case may be had to the Supreme Court under the section referred to in the statutory provision quoted above.

Rule 73(a) of the *Rules of Civil Procedure for the District Courts of the United States* provides in part:

“When an appeal is permitted by law from a District Court to a Circuit Court of Appeals and within the time prescribed, a party may appeal from a judgment by filing with the District Court a notice of appeal.”

The District Court entered final judgment in these consolidated causes (Transcript, page 131) in favor of appellees and against appellants on November 15, 1941. This judgment is within the meaning of the above quoted jurisdictional statute, thus making the judgment subject to review on appeal in this court. Appellants' notice of appeal from the final judgment was filed in the District Court on December 15, 1941. (Transcript, page 136.)

STATEMENT OF THE CASE.

Through this appeal appellants have attacked the propriety of the final judgment entered in the District Court in these consolidated causes on two principal grounds, namely:

First: That the District Court was without jurisdiction over the subject matter and issues presented in said causes;

Second: That the District Court erred in its decision on the merits.

Neither the pleadings nor the evidence show any substantial conflict as to the facts to be considered by the court in passing on each of these points, and those facts have already been set forth and described in detail in this brief under the Jurisdictional Statement.

The jurisdictional questions are raised through retention of jurisdiction by the District Court over the Shores action following denial of appellant Shores' motion to remand this action to the State Court, and

by reason of denial in the final judgment of appellants' motion to dismiss the February 19 and March 11, 1941, petitions filed by appellees in the Hendy reorganization proceeding.

The questions regarding the propriety of the final judgment on the merits are raised by reason of the ruling of the District Court that on and prior to December 20, 1940, the affairs of the Hendy Co. had been *successfully rehabilitated* within the meaning of that term as used in Paragraph 6G 2 of the Hendy Plan of Reorganization, thus permitting appellees Bassick, Hyland and Levit to retain the 2212½ shares of Hendy stock distributed to them by the Hendy Directors on said last mentioned date. It is accordingly appropriate that Paragraph 6G of the Plan be set forth in full here. Said Paragraph reads as follows:

“G. Capital stock.

4425 shares of the capital stock of the debtor corporation are now outstanding, said shares having a book value of \$212,898.51, but no actual value.

In consideration of the extensions granted by the creditors and of the reduction of their claims in the sum of \$73,853.06, as aforesaid, the stockholders shall appropriately endorse and deliver the stock held by them to the Board of Directors of the debtor corporation, appointed as hereinafter provided, to be held by said Board as follows:

1. 50% of the shares so deposited by each stockholder shall be held in trust and voted by said Board for a period of 5 years, and thereafter until the extended obligations are fully

paid, so as to leave the management of the debtor corporation during such period in the hands of its creditors. The Board shall have full power to vote said stock, including the power to vote for a reorganization of the capital structure of the debtor corporation so as to provide, at any time, for an issue of one or more classes of preferred stock and the exchange therefor of any part or all of the unsecured liabilities of the debtor corporation. Upon the expiration of 5 years and the payment in full of the extended obligations, such shares shall be returned to their respective owners.

2. The remaining 50% of the shares so delivered by each stockholder shall be held by said Board free and clear of any claim, right, title, or interest therein by such stockholder, to be distributed by said Board, in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company's affairs." (Transcript, pages 186, 187.)

As stated above, the pertinent facts necessary to a consideration of all of these questions by this court have been set forth in the jurisdictional statement of this brief, and in the interests of brevity will not be repeated here.

**SPECIFICATION OF ERRORS RELIED UPON
BY APPELLANTS.**

I. The District Court erred in making and entering the final judgment herein on November 15, 1941, for the reason that it was without jurisdiction over the subject matter involved in the above entitled consolidated causes, or either of them. This specification of error is also directed at Consolidated Finding of Fact No. XXII (Transcript, page 124) and Consolidated Conclusion of Law No. 1 (Transcript, page 127) wherein the District Court finds and concludes as a matter of law that its jurisdiction over the subject matter of these consolidated causes is sole and exclusive.

II. The District Court erred in denying the motion of appellants Shores and Behneman to dismiss, for want of jurisdiction over the subject matter, appellees' petitions filed in the Hendy reorganization proceeding on February 19, 1941 (Transcript, page 233) and on March 11, 1941 (Transcript, page 286), and to vacate the restraining order entered on March 11, 1941 (Transcript, page 290), and accordingly erred in entering its final judgment in these consolidated causes on November 15, 1941. (See Paragraph 2 of judgment, Transcript, page 133.) This specification of error is also directed at Consolidated Finding of Fact No. XXII (Transcript, page 124) and Consolidated Conclusion of Law No. 1 (Transcript, page 127) wherein the District Court finds and concludes as a matter of law that its jurisdiction over the subject matter of these consolidated causes is sole and exclusive.

III. The District Court erred in approving in its said final judgment entered on November 15, 1941, the certificate and report of Hon. Burton J. Wyman, as Special Master, dated March 28, 1941, and in entering said final judgment in favor of appellees in view of the fact that by reason of their failure to properly intervene in said reorganization proceeding, in accordance with Rule 24 of the Rules of Civil Procedure for the District Courts of the United States, said individual appellees are not proper parties thereto. This specification of error formed the basis of objection No. 1 of appellants' objections to said Special Master's certificate and report (Transcript, page 371), which objections were not ruled upon by said District Court until entry of said final judgment on November 15, 1941. (Transcript, page 133.)

IV. The District Court erred in making its order (Transcript, page 47) denying the motion of appellant Shores to remand the Shores action to the Superior Court of the State of California, in and for the City and County of San Francisco (Transcript, page 45) and in entering final judgment in these consolidated causes. Said action is not one arising under the Constitution or laws of the United States, which was the sole ground urged by appellees for removal thereof from said State Court (in which jurisdiction had already attached) to said District Court, and said motion to remand should accordingly have been granted. This specification of error is also directed at Consolidated Finding of Fact No. XXII (Transcript, page 124) and Consolidated Conclusion of Law No. 1 (Transcript, page 127) wherein the District Court

finds and concludes as a matter of law that its jurisdiction over the subject matter of these consolidated causes is sole and exclusive.

V. The District Court erred in finding and concluding as a matter of law that on and prior to both November 15, 1940 and December 20, 1940, the affairs of appellee Hendy Realization Co. had been successfully rehabilitated within the meaning of that term as used in Paragraph 6G 2 of the Hendy Plan of Reorganization, as specified in Finding No. IX (Transcript, page 106) and in Conclusion of Law No. 2 (Transcript, page 127) of the consolidated findings of fact and conclusions of law made and entered herein.

VI. The District Court erred in finding and concluding as a matter of law that appellees Bassick, Hyland and Levit, as the managing officers of appellee Hendy Realization Co., were entitled to the 2212½ shares of capital stock of appellee Hendy Realization Co. distributed to them on December 20, 1940, by appellees Mayman, Moores, Price and Bassick, and by A. E. Webber (now deceased), as the then Directors of appellee Hendy Realization Co., as specified in Finding No. XV (Transcript, page 115) and in Finding No. XVI (Transcript, page 118) and in Conclusion of Law No. 3 (Transcript, page 128) of the consolidated findings of fact and conclusions of law made and entered herein.

VII. The District Court erred in finding and concluding as a matter of law that appellees Bassick, Hyland and Levit, as the managing officers of appellee Hendy Realization Co., had been inadequately com-

pensated for the services rendered by them to said appellee corporation between March 24, 1936 and November 15, 1940, and in finding and concluding as a matter of law that the payment of additional compensation or bonuses by said appellee corporation to appellees Bassick, Hyland and Levit on December 4, 1940, was proper, as specified in Finding No. XI (Transcript, page 108) and in Finding No. XVI (Transcript, page 118) and in Conclusion of Law No. 3 (Transcript, page 128) of the consolidated findings of fact and conclusions of law made and entered herein. These findings of fact and conclusions of law deal with matters not within the fundamental issues raised by the pleadings, and go beyond the scope of the relief prayed for by any party to these consolidated causes.

VIII. The District Court erred in providing in its judgment that appellants should be permanently restrained and enjoined from interfering with, or attacking through court proceedings or otherwise, the additional compensation or bonus payments made by appellee Hendy Realization Co. to appellees Basick, Hyland and Levit on December 4, 1940, as provided in Paragraph No. 4 of the judgment made and entered herein on November 15, 1941. (Transcript, pages 134, 135.) This relief goes beyond the scope of the issues raised by the pleadings, and the granting of the same was accordingly improper.

SUMMARY OF ARGUMENT.

Appellants' argument of this case will be presented under the following headings:

1. The District Court had no jurisdiction over the subject matter involved in the Hendy reorganization proceeding, as presented by appellees' petitions of February 19 and March 11, 1941. This position will be based upon the contention that:

(a) The Shores State Court action, the companion Behneman State Court action and the Behneman action for State Court supervision over the winning up and dissolution of the Hendy Co. do not seek to interfere with any order or decree of said District Court entered in the Hendy reorganization proceeding, and their prosecution in the State Court should accordingly not have been enjoined;

(b) The Hendy reorganization proceeding was terminated and closed without reservation of jurisdiction by final decree of the District Court entered therein on January 27, 1937; hence, jurisdiction over appellees' petitions of February 19 and March 11, 1941, should not have been entertained.

2. The individual appellees are not proper parties to the Hendy reorganization proceeding for the reason that none of them have ever properly intervened in said proceeding.

3. The District Court had no jurisdiction over the subject matter involved in the Shores action, as presented by appellant Shores' complaint filed therein.

No "federal" question is presented by the facts alleged in this complaint, and its removal from the State Court, where originally commenced and where jurisdiction had already attached, was therefore improper.

4. The judgment of the District Court on the merits was erroneous.

5. The injunctive relief granted appellees exceeds the issues raised in these consolidated causes.

ARGUMENT.

1. **THE DISTRICT COURT HAD NO JURISDICTION OVER THE SUBJECT MATTER INVOLVED IN THE HENDY REORGANIZATION PROCEEDING AS PRESENTED BY APPELLEES' PETITIONS OF FEBRUARY 19 AND MARCH 11, 1941.**

Subdivision (h) of former Section 77-B of the National Bankruptcy Act reads, in part, as follows:

"Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case." (*U.S.C.*, Title 11, Sec. 207.)

On January 27, 1937, the District Court entered a final decree in the Hendy reorganization proceeding pursuant to the above quoted subdivision of said Section 77-B. This final decree contained no reservation of jurisdiction whatsoever. On the contrary, it was therein determined that the Hendy plan of Reorganization had been fully consummated and carried into effect, and Paragraph 16 of said final decree provided:

“That the proceedings for the corporate reorganization of the debtor in this court, entitled ‘In the Matter of The Joshua Hendy Iron Works, a corporation, Debtor, No. 25937-S’, be, and the same hereby are, terminated and closed; such termination and closing to be for all purposes final upon the filing herein of receipts showing the payment of the final fees and expenses hereinabove allowed, and the surrender and exchange of the stock certificates which have not yet been surrendered and exchanged as provided in said Plan of Reorganization.” (Transcript, pages 231, 232.)

No further orders were thereafter made, and no further proceedings of any kind were thereafter had or taken in connection with the Hendy reorganization proceeding until the filing therein of appellees’ petition of February 19, 1941, *over four years after entry of said final decree*. Under this petition and their supplemental petition of March 11, 1941, the individual appellees, therein referred to as “Petitioners”, seek to restrain appellants Shores and Behneman, therein referred to as “Respondents”, from further prosecution of their then pending State Court actions above described. The gist of appellees’ February 19 and March 11, 1941, petitions is that the said State Court actions seek to obstruct, attack and interfere with the order and decree of the District Court confirming the Hendy Plan of Reorganization. In this connection, it is significant to note here that said State Court actions affected only the individual appellees and not the rights of either the Hendy Co. or its creditors; and, accordingly, *that the only persons to be*

benefited through the enjoining of further prosecution of these State Court actions were the individual appellees. These facts give rise to two of the jurisdictional questions to be determined on this appeal:

(a) Did the State Court actions initiated by appellants seek to obstruct, attack or interfere with the order and decree of the District Court approving and confirming the Hendy Plan of Reorganization, thus entitling appellees to have the further prosecution of these actions permanently enjoined?

(b) In view of entry of the final decree in the Hendy reorganization proceeding on January 27, 1937, did the District Court have continuing jurisdiction over the subject matter presented in the injunction proceedings instituted by appellees' petitions of February 19 and March 11, 1941?

For the following reasons, appellants' answers to each of these questions are in the negative.

1(a). THE STATE COURT ACTIONS INSTITUTED BY APPELLANTS SHORES AND BEHNEMAN DID NOT SEEK TO OBSTRUCT, ATTACK OR INTERFERE WITH THE ORDER AND DECREE OF THE DISTRICT COURT APPROVING AND CONFIRMING THE HENDY PLAN OF REORGANIZATION.

Discussion of the Shores and Behneman declaratory relief actions.

The character of the Shores and Behneman State Court actions has already been fully described. It will be recalled that under Paragraph 6G 2 of the Hendy Plan it was provided that 50% of the Hendy shares surrendered by each of the old Hendy stockholders to the Hendy Board of Directors was to be held by said

Board “free and clear of any claim, right, title or interest therein by such stockholder, to be distributed by said Board, in its sole discretion, either in whole or in part, to the managing officers thereof, *as a reward for management and the successful rehabilitation of the company’s affairs.*” (Italics ours.)

Unfortunately, the Hendy Plan does not define what is meant by the term “successful rehabilitation”, or prescribe under what circumstances the affairs of the Hendy Co. would be deemed to have been successfully rehabilitated. Had it done so, the question of whether or not the affairs of this company had been successfully rehabilitated on or about December 20, 1940, when the stock was distributed, could readily have been determined. Such determination would, however, necessarily have depended upon *events occurring after the Plan had been consummated and put into effect*—not before. In the absence of a definition of this term in the Plan, it becomes necessary to consider what all of the parties thereto, that is to say, the Hendy stockholders and creditors, intended it to mean when the Plan was approved by them and confirmed by the District Court. Once the intended meaning of the term is thus established, it likewise then becomes equally necessary to review *events occurring subsequent to consummation of the Plan and to the conclusion of the reorganization proceeding* in order to determine whether successful rehabilitation of the Hendy Co.’s affairs was ever accomplished.

Through the State Court actions brought by appellants on behalf of the Hendy Co. and all of its stockholders against the individual appellees as the Direc-

tors and managing officers of said company appellants seek a judicial determination, i.e., a declaratory judgment, with respect to the property rights of the parties in the stock which, prior to the commencement of said actions, had been distributed to appellees Bassick, Hyland and Levit, as managing officers, under the circumstances described above. In these actions it is contended that, in view of events occurring after the closing of the reorganization proceeding, a successful rehabilitation of the affairs of the Hendy Co. within the meaning of that term as used in the Hendy Plan had not been accomplished, and the State Court is called upon to determine whether this contention is correct. Jurisdiction over the parties to, and the subject matter of, these actions had already attached in the State Court at the time when their further prosecution was enjoined by said District Court. It is appellants' contention that the questions thus presented in these State Court actions could have been, and should have been, determined in the State Court, which court had original and exclusive jurisdiction thereof.

Prosecution of appellants' State Court actions has been permanently enjoined by the District Court on the sole ground that they seek to obstruct, attack and interfere with its order approving and confirming the Hendy Plan of Reorganization. This presents the question: In what way can these State Court actions be said to attack, obstruct or interfere with this order? It is true that through these actions appellants question the interpretation placed on Paragraph 6G 2 of the Hendy Plan *by the appellee Hendy Directors* long after the Plan was carried into effect, and that appel-

lants likewise question the right of said Directors to distribute the Hendy stock in controversy solely upon the basis of *their interpretation* of the meaning of the term “successful rehabilitation of the company’s affairs” as used in the Hendy Plan. As pointed out above, neither the Hendy Plan nor any order of the District Court with reference thereto defines the meaning of the term “successful rehabilitation”, or prescribes under what circumstances such event will be deemed to have been accomplished. This being true, it cannot be said that appellants’ State Court actions attack, obstruct or interfere with anything ordered or prescribed in any order of the District Court pertaining to the Plan. They merely seek a determination of property rights arising out of the Plan, and it will be remembered that the reorganization proceeding had been terminated and closed by final decree approximately four years prior to the filing of these actions.

A “Plan of Reorganization”, as the term was used in proceedings under Section 77-B of the Bankruptcy Act, is, after all, merely a contract between the debtor corporation, its creditors and stockholders, whereby the rights of those parties are adjusted in a manner acceptable to them, and once they have agreed in this respect the order of the District Court approving and confirming that agreement merely gives the Plan subsequent legal effect. As stated by Mr. Gerdes (*Gerdes on Corporate Reorganization*, Vol. 2, p. 1664, Sec. 1036) :

“The entire proceeding under this amendment (77-B) has for its sole purpose the preparation of a plan, its approval by the court, and its con-

summation under the direction of the court * * * Upon confirmation by the court the plan is binding upon all creditors and stockholders of the debtor corporation."

Johnson on Bankruptcy Reorganizations (p. 519, Sec. 603a) characterizes a Plan of Reorganization as follows:

"A reorganization plan, although formulated according to statutory rules, is similar to a composition arrangement and is therefore simulated to a contract or agreement. While dissenters are bound by the requisite majority accepting the plan, it is in effect an agreement by which, under the law, the minority are bound by the majority. The relation of co-creditors and co-stockholders is recognized, and collective action is coerced. *The rules of construction and interpretation applied to contracts govern in the analysis of a reorganization plan.*" (Italics ours.)

Viewing the Hendy Plan as an ordinary contract, the meaning and interpretation of which is not entirely clear in certain particulars, and in connection with which a controversy has arisen between the parties with respect to certain rights established thereby, it certainly cannot be said that a State Court is without power to construe and interpret that contract in accordance with established legal principles governing the construction of contracts. On the other hand, the same conclusion must be reached if the Plan is considered as merged into the order of the District Court confirming it. The order of the District Court approving and confirming the Hendy Plan is a final

judgment, no appeal ever having been taken therefrom. As such, it is no different from any other final judgment. It is fundamental that a judgment creates a contract or obligation between the parties (33 *C. J.* 1056, Judgments, Sec. 9; *Weaver v. City & County of San Francisco*, 146 Cal. 728 at 732), and that a new action may be brought upon a final and subsisting judgment. (15 *Cal. Jur.* 258, Judgments, Sec. 258.) Thus an action on a judgment is an action on a contract, irrespective of the nature of the original transaction on which the judgment is founded. (33 *C. J.* 1057, Judgments, Sec. 9.) Furthermore, an action may be maintained in a state court upon a judgment rendered in a Federal Court. (34 *C. J.* 1160, 1161, Judgments, Sec. 1643; 34 *C. J.* 1104, Judgments, Sec. 1569.)

We do not believe that appellees will or can contend that a state court is without power to construe the language and effect of a final judgment rendered by a Federal court if called upon to do so in an appropriate action based upon such final judgment. The mere fact that a suit in a state court is brought on a judgment recovered in a Federal court does not entitle the defendant to a removal to the Federal court. (*Provident Savings Life Assurance Society of New York v. Ford*, 114 U. S. 635, 29 L. Ed. 261.) For, as pointed out above, a final judgment is a contract, and the interpretation and construction of contracts is within the province of a state court. The legal operation and effect of a judgment must be ascertained by a construction and interpretation of it. This presents a question of law for the court. Judgments

must be construed as a whole, and so as to give effect to every word and part. Where a judgment is susceptible of two interpretations, that one will be adopted which renders it more reasonable, effective and conclusive (34 *C. J.* 501, Judgments, Sec. 794); and it must be remembered that the Shores and Behneman State Court actions were filed pursuant to the California Declaratory Relief Act (Sec. 1060, *Cal. Code of Civil Procedure*), which provides:

“Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a water course, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.”

Henderson v. Oroville-Wyandotte Irrigation Dist., 207 Cal. 215, is a case in point here. In this case,

plaintiff brought an action for declaratory relief to have his water rights in certain land declared. The California Superior Court in which this action was filed was called upon to construe an order of the California Railroad Commission which had become final. Defendant maintained that such order was reviewable only in the State Supreme Court, and its demurrer to plaintiff's complaint was sustained without leave to amend. In reversing this ruling, the California Supreme Court said that the validity of the order of the Railroad Commission was not in question or under review, but that the interpretation only of that order was before the court. In this connection, the court said (at page 219):

“Where a written instrument affects the title to real property, otherwise subject to the jurisdiction of the Superior Court, we can conceive of no reason why such an instrument may not be construed and its meaning declared, *even though the document is final in its nature and is the result of action by either the legislative, executive or judicial branches of a state government or the Government of the United States.*” (Italics ours.)

It is submitted that this reasoning is applicable to this case, and that an application to a state court for the determination of property rights growing out of a Plan of Reorganization confirmed by a Federal court in a proceeding which has been finally terminated and closed is not tantamount to an interference with, an attack upon, or an obstruction of the final judgment of such Federal court approving and confirming the Plan, even though, as an incident to grant-

ing the relief sought, the state court is called upon to construe uncertain or ambiguous language contained in such Plan in order to determine the intention of the parties thereto, or to determine the property rights created thereby. Cases such as *Holmes v. Rowe*, 97 Fed. (2d) 537 (C. C. A. 9, 1938); *Local Loan Co. v. Hunt*, 292 U. S. 234, 78 L. Ed. 1230; and *In re Hermitage Bldg. Corp.*, 100 Fed. (2d) 597 (C. C. A. 7, 1938), are not in point, for in each of these cases *an attempt was made to specifically do some act or thing which the court had previously decreed should not be done*. Such is not the case here.

Discussion of the Behneman action for State Court supervision over the winding up and dissolution of the Hendy Co.

The temporary restraining order of the District Court entered in the Hendy reorganization proceeding on March 11, 1941 enjoined not only the further prosecution of the Shores and Behneman State Court declaratory relief actions described and discussed above, but also the further prosecution of the previously referred to State Court action instituted by appellant Behneman on February 25, 1941, entitled "In the Matter of the Voluntary Winding Up and Dissolution of Hendy Realization Co., a corporation". Under the final judgment of the District Court entered in these consolidated proceedings on November 15, 1941, the prosecution of this State Court action has been permanently enjoined upon the express finding "That in and by said actions said respondents moreover seek to have said Superior Court construe and interpret the terms and provisions of said order

dated March 24, 1936, particularly with reference to the distribution of said stock as aforesaid, and seek to have said Superior Court declare and determine the rights and duties of the parties thereunder and the nature, extent, and effect of said order dated March 24, 1936; and that *said actions all grow out of, relate to, and involve the proceedings for the reorganization of Hendy Co., one of the above entitled consolidated causes*” (see Finding No. XXI, Transcript, page 124); and upon the further express finding “That it is true that said respondents, and each of them, threaten to continue and prosecute said actions in said Superior Court unless restrained and enjoined therefrom; that, unless restrained and enjoined from so doing by the above entitled court, respondents and each of them will proceed with the prosecution of said actions and the taking of other actions designed to interfere with and defeat the terms, purpose, and enforcement of said order dated March 24, 1936, and will seek to prevent and nullify the enforcement and effectuation thereof; * * *” (See Finding No. XXIII, Transcript, page 125.)

As will appear from the complaint filed in this State Court action (Transcript, page 368), appellant Behneman, as the owner of more than 5% of the outstanding stock of the Hendy Co., seeks to avail himself of the provisions of Sec. 403 of the *California Civil Code*, which provides for State Court supervision over all matters pertaining to the winding up of the affairs of a California corporation when such corporation is in the process of voluntary winding

up and dissolution. Voluntary dissolution proceedings were admittedly commenced by the Hendy Co. on or about December 20, 1940 (see Stipulation of Counsel, Transcript, pages 569, 570; also Finding No. XVIII; Transcript, page 119), over two months prior to commencement of this Behneman State Court action, and said dissolution proceedings are still pending. Accordingly, this State Court action is *purely statutory* in character and was initiated under a California statute designed to afford a corporate stockholder the relief therein provided for. Such action can have no possible connection with the Hendy reorganization proceeding or the Hendy Plan of Reorganization, and there is no comparable action available to appellant Behneman or any other stockholder of the Hendy Co. in the Federal courts. Therefore, to permanently enjoin further prosecution of this action is to deprive appellant Behneman, as a stockholder of the Henry Co., of an established right guaranteed by State statute. It is submitted that under these circumstances the District Court was without jurisdiction to issue a permanent injunction bringing about this result. The findings referred to and quoted above, insofar as they purport to deal with this particular State Court action, are wholly unsupported by any evidence whatever in the record, and the injunction enjoining its further prosecution should accordingly be dissolved.

1(b). IN VIEW OF ENTRY OF THE FINAL DECREE IN THE HENDY REORGANIZATION PROCEEDING ON JANUARY 27, 1937, DID THE DISTRICT COURT HAVE CONTINUING JURISDICTION OVER THE SUBJECT MATTER PRESENTED IN THE INJUNCTION PROCEEDINGS INSTITUTED BY APPELLEES' PETITION OF FEBRUARY 19 AND MARCH 11, 1941?

This subdivision of this brief raises a question which has not heretofore been the subject of many decisions in the Federal courts. Under the final decree entered in the Hendy reorganization proceeding on January 27, 1937, there was no reservation of jurisdiction whatsoever provided for by the District Court (Transcript, page 225 at 231); and no further proceedings of any kind were thereafter had or taken therein until the filing of appellees' petition of February 19, 1941—over four years after entry of the final decree and the closing of the case. This statement is supported by the certificate of the clerk of said District Court (Transcript, page 152), in which it is stated that “* * * there are included in the accompanying record on appeal all pleadings and orders filed therein subsequent to January 27, 1937, and up to the date of entry of judgment on November 15, 1941, as designated, and that there is no record in my office of any proceedings taken or had in said action, No. 25,937-S, during said period other than as indicated in the accompanying record on appeal”. Examination of the record on appeal before this court reveals that from January 27, 1937 until February 19, 1941 *no pleadings or orders were filed, and no proceedings of any kind were taken*, in the Hendy reorganization proceeding, numbered 25,937-S, in said District Court.

It is therefore appellants' contention that through entry of this final decree, without any reservation of

jurisdiction, the District Court lost all power to later entertain jurisdiction over injunction proceedings of the character instituted by appellees' petitions of February 19 and March 11, 1941, and that the old reorganization proceeding, having been definitely and finally closed, could not be revived through the filing of such petitions. This contention is supported by the few available decisions on the subject, namely:

In re Argyle-Lakeshore Bldg. Corp., 98 Fed.

(2d) 372 (C. C. A., 7th Cir., June, 1938);

In re Diversey Bldg. Corp., 90 Fed. (2d) 703

(C. C. A., 7th Cir., June, 1937);

In re Corona Radio and Television Corp., 102

Fed. (2d) 959 (C. C. A., 7th Cir., April, 1939);

In re Sherland Bldg. Corp., 29 Fed. Sup. 985

(D. C. N. D. Indiana, November, 1939);

In re Volland, 83 Fed. (2d) 680 (C. C. A., 7th

Cir., April, 1936).

The District Court accordingly erred in denying appellants' motion to dismiss appellees' petitions of February 19 and March 11, 1941.

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2. THE INDIVIDUAL APPELLEES ARE NOT PROPER PARTIES TO THE HENDY REORGANIZATION PROCEEDING FOR THE REASON THAT NONE OF THEM HAVE EVER PROPERLY INTERVENED IN SAID PROCEEDING.

In filing their above described petitions of February 19 and March 11, 1941 in the Hendy reorganization proceeding, the individual appellees styled them-

selves as “Petitioners”, and it will be remembered that they are the same individuals named as “Defendants” in the Behneman and Shores State Court declaratory relief actions. However, none of the individual appellees had ever previously been “parties” to the reorganization proceeding. Therefore, even assuming (but not conceding) that the reorganization proceeding had not been finally terminated and closed by the final decree entered therein on January 27, 1937, the appellees would necessarily have had to *intervene in the reorganization proceeding in order to become proper parties thereto* and in order to give the District Court jurisdiction to consider the subject matter of their petitioners. It is clear from the record that none of the individual appellees ever had intervened in the reorganization proceeding prior to the filing of these petitions. (See Certificate of the Clerk of the District Court, Transcript, page 152; also items 1 and 2 of appellants’ Supplemental Designation of Contents of Record on Appeal filed in the District Court, Transcript, page 147.)

Subdivision (c)(11) of Former Sec. 77-B of the *Bankruptcy Act* (U. S. C. Title 11, Sec. 207), under which the Hendy reorganization proceeding was instituted, provided in part:

“Any creditor or stockholder shall have the right to be heard on the question of the permanent appointment of any trustee or trustees, and upon the proposed confirmation of any reorganization plan, *and upon filing a petition for leave to intervene, on such other questions arising in the proceeding as the judge shall determine.*” (Italics ours.)

Under the foregoing quotation from former Section 77-B, the right of a party in interest to be heard in a proceeding under that section was definitely *conditioned upon intervention* except as to the appointment of a trustee or as to the confirmation of a reorganization plan. These are the exclusive exceptions (*In re Trust No. 2988 of Foreman Trust & Savings Bank*, 85 Fed. (2d) 942, C. C. A., 7th Cir., 1936), neither of which are involved here.

In 33 *Cor. Jur.* 477, the term "intervention" is defined as:

"* * * the act or proceeding by which a third party becomes a party in a suit pending between others; * * *"

In re Willacy County Water Control & Imp. Dist. No. 1, 36 Fed. Sup. 36 at 40, defines "intervention" as follows:

"Intervention is the admission, by leave of the court, of a person not an original party, into the proceeding, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by the proceeding."

Rule 24 of the *Rules of Civil Procedure for the District Courts of the United States* specifically describes the circumstances under which intervention is permitted, and outlines the procedure to be followed with reference thereto. In *Miami County National Bank, etc. v. Bancroft*, 121 Fed. (2d) 921 at 925, 926 (C. C. A., 10th Cir., 1941), in discussing the failure of the Attorney General of Kansas to inter-

vene in certain actions in the Federal District Court to establish heirship, the purpose of Rule 24 is stated to be as follows:

“Rule 24 of the new Federal Rules, 28 U. S. C. A. following Sec. 723(c) relates to intervention. It provides for both permissive intervention and for intervention as a matter of right. In each instance timely application must be made. Subsection (c) of the Rule provides that one desiring to intervene shall serve a notice upon all parties affected thereby. The motion for intervention must state the grounds therefor and shall be accompanied by a pleading setting forth the claims or defense upon which intervention is sought. No part of this Rule was complied with by the Attorney General * * * No pleading was filed with the application, as required by Rule 24(c). The purpose of the Rule requiring the motion to state the reasons therefor and accompanying the motion with a pleading setting forth the claim or defense is to enable the court to determine whether the applicant has the right to intervene, and, if not, whether permissive intervention should be granted.”

Whether the individual appellees in these causes would have been permitted to intervene in the Hendy reorganization proceeding upon a proper application to the District Court is a moot question. The important point here is that *they failed to properly intervene or to take any steps whatsoever in that direction*. Appellants urged this point in arguing before the Special Master their motion to dismiss appellees' petitions of February 19 and March 11, 1941 and

vacate the temporary restraining order based thereon, but in his certificate and report filed with the District Court (Transcript, page 293) following this argument, the Special Master completely ignored this subject. Appellants again raised the same point in their written objections filed in the District Court to the Special Master's certificate and report (see Objection No. 1, Transcript, page 371), but the District Court likewise ignored the same in the findings of fact and conclusions of law upon which its judgment of November 15, 1941 is based.

That the individual appellees could not become proper parties to the Hendy reorganization proceeding by the mere act of filing their petitions of February 19 and March 11, 1941 in the District Court, duly captioned in this proceeding, seems too obvious to require citation of authority. However, the recent case of *Cowan v. Tipton, et al.*, 1 Fed. Rules Dec. 694 (D. C. E. D. Tenn. S. D., March 21, 1941), is directly in point. In this case, one Mary Lee Moore, not previously a party to the action, had filed therein an answer and cross-complaint without complying with Rule 24 of the Rules of Civil Procedure for the District Courts of the United States. Motions to dismiss and to strike this answer and cross-complaint were granted. The court said:

“From the record it appears that Mary Lee Moore is not one of the original parties and that she seeks to become an intervening party by simply filing an answer and a cross-complaint.

No order of the court has been had or sought to make her an intervening party.

Under Rule 24 of the Rules of Civil Procedure for the United States District Courts, 28 U. S. C. A. following Sec. 723(c), there are very plain provisions as to the conditions under which a person may become an intervening party and very plain provisions as to the procedure necessary to obtain the permission to become such party."

and later in its opinion the court said:

"It is plain that a person cannot become an intervening party on his own motion. This is true whether his right to become such party is conditional or unconditional. It is for the court to determine this question after reviewing the facts as reflected in the motion and in the pleadings accompanying the motion.

Mary Lee Moore has not complied with the Rule in any respect and her answer and cross-complaint have no place in the record."

It may not be amiss to here anticipate, and answer, the possible contention of the individual appellees that, irrespective of their failure to properly intervene in the Hendy reorganization proceeding, the Hendy Co. was nevertheless a proper party thereto and, accordingly, that the petitions of February 19 and March 11, 1941 were properly filed on its behalf. However, even assuming (but not conceding) that the reorganization proceeding was still open at the time these petitions were filed, such a contention is without merit. The Shores and Behneman State Court actions against which these petitions were directed in no way affect the Hendy Co., its property or its creditors.

The corporate stock of the Hendy Co., not its corporate assets, is the subject matter in controversy in these State Court actions. It is true that the company is joined as a nominal defendant in these State Court actions, but these actions are actually brought in its behalf and for its benefit and the benefit of all of its stockholders, other than appellees Bassick, Hyland and Levit as distributees of the stock in question. Through these State Court actions relief is sought only *against the individual appellees, as defendants therein*, and they are the only ones who could be *adversely affected* by a decision favorable to the plaintiffs in these actions. In other words, the controversy to be determined by the State Court declaratory relief actions centers entirely around the Hendy stock distributed to appellees Bassick, Hyland and Levit, and only the propriety of this stock distribution is in dispute between the individual parties to these actions, that is to say, the old Hendy stockholders on the one hand and the Hendy Directors and managing officers on the other. The District Court accordingly erred in denying appellants' motion to dismiss appellees' February 19 and March 11, 1941 petitions by reason of their failure to properly intervene in the Hendy reorganization proceeding.

3. THE DISTRICT COURT HAD NO JURISDICTION OVER THE SUBJECT MATTER INVOLVED IN THE SHORES ACTION AS PRESENTED BY APPELLANT SHORES' COMPLAINT FILED THEREIN. NO "FEDERAL QUESTION" IS PRESENTED BY THE FACTS ALLEGED IN THIS COMPLAINT, AND ITS REMOVAL FROM THE STATE COURT WHERE ORIGINALLY COMMENCED, AND WHERE JURISDICTION HAD ATTACHED, WAS THEREFORE IMPROPER.

The allegations of the complaint in the Shores action, originally filed in the State Court, have already been summarized and the character of the relief sought therein has been described. As previously pointed out, this action was removed to the District Court upon the petition of defendants therein (appellees here), and appellant Shores' motion in the District Court to remand the action to the State Court was denied. (Transcript, page 47.) The order overruling this motion to remand was not a final judgment on the merits, and it is well settled that a ruling on a motion to remand a cause from a Federal to a State Court is reviewable on appeal from final judgment. (*Morgan v. Kroger Grocery & Baking Co.*, 96 Fed. (2d) 470, C. C. A. 8th Cir., 1938.) To this effect also see:

Lockhart v. New York Life Ins. Co., 71 Fed. (2d) 684 (C. C. A. 4th Cir. 1934);

Thomas v. Great Northern Ry. Co., 147 Fed. 83 (C. C. A. 9th Cir.);

Bender v. Pennsylvania Co., 148 U. S. 502, 37 L. Ed. 537.

The general appearance by appellant Shores in the District Court after removal of her action from the State Court and denial of her motion to remand did not waive her objection to the jurisdiction of the Dis-

trict Court founded on a total lack of any controversy of a Federal nature. (*In re Winn*, 53 L. Ed. 873, 213 U. S. 457; *Pepper v. Rogers*, 128 Fed. 987.) In fact, as stated in *Schell v. Food Machinery Corp.*, 87 Fed. (2d) 385 at 387 (C. C. A. 5th Cir. 1937):

“The question of Federal jurisdiction is ever present and self-asserting. The court must of its own motion and even against the consent or the protest of the parties consider it.”

As will appear from appellees' removal petition (Transcript, page 31), the sole ground urged in removing the Shores action from the State to the Federal Court was that it involves a “federal question”. In other words, in invoking the jurisdiction of the District Court it was and is contended by appellees that this action is one “arising under the Constitution or laws of the United States” within the meaning of the so-called removal statute. (*Judicial Code* Sec. 28, *U. S. C.* Title 28, Sec. 71.) Therefore, unless the complaint in the Shores action presents a *federal question*, that is to say, unless under the allegations thereof the case presented is one which *arises under the Constitution or laws of the United States*, then the District Court erred in denying appellants' motion to remand the same to the State Court.

A case arises under the laws of the United States only when a recovery depends upon the construction of such a law, and if a bona fide dispute concerning such laws does not exist, a Federal Court does not have jurisdiction. This is the settled rule.

Spencer v. Duplan Silk Co. (Pa. 1903), 191 U. S. 526, 48 L. Ed. 287;

- Little York Gold-Washing etc. Co. v. Keyes* (Cal. 1878), 96 U. S. 199, 24 L. Ed. 656;
California Oil. etc. Co. v. Miller (C. C. Cal. 1899), 96 Fed. 12;
Cuyahoga River Power Co. v. Northern Ohio etc. Co. (Ohio 1920), 252 U. S. 389, 64 L. Ed. 626;
Ford Brothers & Co. v. Eddington Distilling Co. (D. C. M. D. Penn. 1939), 30 Fed. Sup. 213;
Wilson v. Robinson (C. C. A. 9th Cir.), 16 Fed. (2d) 431, Certiorari denied, 275 U. S. 526, 72 L. Ed. 407;
Gustason v. Cal. Trust Co. (C. C. A. 9th Cir.), 73 Fed. (2d) 765;
Marshall v. Desert Prop. Co. (C. C. A. 9th Cir. 1939), 103 Fed. (2d) 551, Certiorari denied, 84 L. Ed. 473, 308 U. S. 563;
 1 *Cyc. Fed. Proc.* 853, Sec. 184;
Blackburn v. Portland Gold Mining Co., 175 U. S. 571, 44 L. Ed. 276 at 281.

The test of what constitutes a case arising under the laws of the United States was stated by this Court in *Wilson v. Robinson*, *supra*, as follows:

“The only ground upon which the plaintiff seeks to predicate federal jurisdiction is that the case arises under the laws of the United States. It is familiar knowledge that, to bring a case within this branch of jurisdiction, it must affirmatively and distinctly appear from the averments of the pleading that ‘it really and substantially involves a dispute or controversy respecting the validity,

construction, or effect of' a federal law, 'upon the determination of which the result depends'."

Whether a case is removable as one arising under the laws of the United States depends entirely upon, and is to be determined by, the allegations of plaintiff's declaration or complaint.

American Well Works v. Layne & Bowler Co.,
241 U. S. 257, 60 L. Ed. 987;

Great Northern Ry. Co. v. Alexander, 246 U. S.
276, 62 L. Ed. 713;

Mosher v. City of Phoenix, 287 U. S. 29, 77
L. Ed. 148;

Wilson v. Robinson, *supra*;

25 C. J. 767, Federal Courts, Sec. 78.

This is true irrespective of the facts developed on the trial in the Federal Court or the decision on the merits.

Pac. Electric Ry. Co. v. Los Angeles, 194 U. S.
112, 48 L. Ed. 896, 899;

Mosher v. City of Phoenix, *supra*.

If on the face of the complaint or petition a case is not removable, it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant.

Great Northern Ry. Co. v. Alexander, *supra*.

Upon application of the foregoing rules and tests to the complaint in the Shores action (Transcript, page 3), it becomes apparent that the same does not present a *federal question* within the recognized and well defined meaning of that term. The facts therein

alleged do not involve a dispute or controversy respecting the validity, construction or effect of any Federal law. The Shores action merely involves a determination of the property rights of the parties thereto with respect to stock of the Hendy Co. in question, which rights were established by, and rise out of, the Hendy Plan of Reorganization and decree of the District Court confirming it. Those rights can only be determined in the light of events occurring since the conclusion of the reorganization proceeding in the District Court. Such determination may incidentally involve the interpretation and construction of the Hendy Plan, with particular reference to the meaning of the term “*successful rehabilitation*” as used in Paragraph 6G 2 of said Plan. But neither the Constitution nor laws of the United States can afford any aid in the solution of this problem. It is simply a question of law to be determined by well settled rules of construction, rules which a State Court may apply with perfect propriety, as previously pointed out in this brief. A suit to enforce a property right acquired under the authority of judgments and decrees of a Federal Court may be maintained without presenting any question involving the laws of the United States. Such a suit is not necessarily one *arising under the Constitution or laws of the United States* within the meaning of the removal statute. This is clearly recognized in *Carson v. Dunham*, 121 U. S. 421, 30 L. Ed. 992 at 994, where the court, in quoting from *Provident Sav. etc. Society v. Ford*, 114 U. S. 635, 29 L. Ed. 261 said:

“* * * a suit on such a judgment is ‘simply the case of an ordinary right of property sought to be enforced’, unless some question is raised ‘distinctly involving the laws of the United States’.”

The case of *United States ex rel. State of North Carolina, et al. v. Douglas* (Supreme Court of N. C. 1893), 113 N. C. 190, 18 S. E. 202, 203, is in point. This was a civil action brought in the Superior Court of Wake County, North Carolina, against the sureties on the bond of a receiver appointed in the Federal Circuit Court for the Eastern District of North Carolina. Defendant Douglas petitioned to remove the case to said Federal Circuit Court upon the ground that a federal question was involved, namely, that under the complaint the construction of the receivership bond and certain decrees and orders of the Federal court referring thereto was presented. In denying this removal petition, the Supreme Court of North Carolina said:

“There is nothing to show that any question of construction of these decrees and orders, other than the necessity to interpret them according to their plain meaning, will arise. If the act should receive the wide interpretation claimed for it by the petitioner, no cause could be tried in the state court if objection were raised by the defendant, where any right had been formerly determined in a federal court as a discharge in bankruptcy, or where the title to land sold under foreclosure proceedings in such court were necessary to be shown in evidence, or the like. The simple question is whether the defendants are liable upon the bond,

and to what amount. It is like an 'attempt to enforce an ordinary property right acquired under the authority of judgments and decrees in the courts of the United States, without presenting any question distinctly involving the laws of the United States'. *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. Rep. 1030."

It is true that in the *Shores* case appellant *Shores* seeks the determination of rights which originated out of a Plan of Reorganization formulated under the provisions of former Section 77-B of the National Bankruptcy Act, but such a determination in no sense requires a construction of that law and no controversy exists with reference thereto. As aptly stated by Judge Stephens in *Marshall, et al. v. Desert Properties Co., et al.*, *supra* (103 Fed. (2d) 551 at 552), a case decided in this court:

"It is well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily, for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such law, upon the determination of which the result depends. *Gully v. First National Bank*, *supra*. As said by the Supreme Court in *Cook County v. Calumet, etc. Canal Co.*, 138 U. S. 635, 11 S. Ct. 435, 440, 34 L. Ed. 1110, 'The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.' "

Federal Courts do not acquire jurisdiction of a cause merely because a Federal statute must be referred to in order to explain a contract. *Hannum v. New Amsterdam Casualty Co.*, 330 Pa. 353, 199 Atl. 331 (Sup. Ct. Pa. 1938).

For the reasons expressed above, the District Court erred in holding that a "federal question" is presented by the allegations of the Shores complaint, and in denying appellant Shores' motion to remand that action to the State Court.

**4. THE JUDGMENT OF THE DISTRICT COURT ON THE
MERITS WAS ERRONEOUS.**

The controversy presented by these consolidated causes was created by the distribution to appellees Bassick, Hyland and Levit on December 20, 1940 of 2212½ shares of Hendy stock—the same shares previously surrendered by the old Hendy stockholders under the provisions of Paragraph 6G 2 of the Hendy Plan of Reorganization. This stock was presumably distributed upon the theory that the last mentioned appellees, as managing officers of the Hendy Co., were entitled to it under the provisions of said Paragraph 6G 2. Whether this stock distribution was proper is the fundamental question to be determined by this court in deciding whether the judgment of the District Court was correct *on the merits*. If the judgment is sustained, appellees Bassick, Hyland and Levit, as the owners of the shares in question, will be entitled to participate in the distribution of all future liquidating

dividends declared by the Hendy Co. upon an equal pro rata basis with the old stockholders. If the judgment is reversed, said appellees would be excluded from such participation in so far as the shares in question are concerned, assuming that such reversal were to result in the granting of the relief prayed for in the Shores action.

The propriety of this stock distribution depends upon:

1. A proper construction or interpretation of the meaning and effect of Paragraph 6G 2 of the Hendy Plan, and particularly of the term “successful rehabilitation” as used in said Paragraph; and

2. A determination of whether the affairs of the Hendy Co. had been *successfully rehabilitated* on December 20, 1940 (the date of the stock distribution), in view of events which occurred *after March 24, 1936*—when the Hendy Plan was approved by the District Court with directions that it be put into effect.

Construction of paragraph 6G 2 of the Hendy plan as a whole.

Paragraph 6G 2 of the Hendy Plan is quoted in full on page 17 of this brief. It will be noted that under the provisions of this Paragraph the managing officers of the Hendy Co. were to receive the stock in question “as a reward for management *and* the successful rehabilitation” of the Hendy Co.’s affairs. “Management” and “successful rehabilitation” are used in the conjunctive, and distribution of the stock in ques-

tion can accordingly be justified only in the event that successful rehabilitation was accomplished. It cannot be said that distribution of the stock as a reward for management alone would have been warranted, for the words *successful rehabilitation* would thus be rendered meaningless. This would be inconsistent with well established rules of legal construction.

It is stated in 3 *Cor. Jur. Secundum*, 1068, that:

“Ordinarily the words ‘and’ and ‘or’ are in no sense interchangeable terms, but, on the contrary are used in the structure of language for purposes entirely variant, the former being strictly of a conjunctive the latter of a disjunctive, nature. Nevertheless, in order to effectuate the intention of the parties to an instrument, a testator, or legislature, as the case may be, the word ‘and’ is sometimes construed to mean ‘or’. This construction, however, is never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion, as where it must be done in order to effectuate the manifest intention of the user, and where not to do so would render the meaning ambiguous, or result in an absurdity, or would be tantamount to a refusal to correct a mistake.”

In *Robinson v. Southern Pacific Co.*, 105 Cal. 526, 543, the Supreme Court of California in speaking of the words “and” and “or”, stated:

“Ordinarily they are in no sense interchangeable terms, but, upon the contrary, are used in the structure of language for purposes entirely variant. ‘There is a world of difference between the little words “and” and “or”.’ *State v. Beaucleigh*, 92 Mo., 497.”

For other cases holding that the words “and” and “or” are not interchangeable terms but, on the contrary, are used in the structure of language for purposes entirely variant, see:

City of Corona v. Merriam, 20 Cal. App. 231;
Dickinson Industrial Site Inc. v. Cowen, 309
 U. S. 382, 84 L. Ed. 819;
Mayer v. Cook, 57 N. Y. S. 94;
Pitcairn v. American Refrigerator Transit Co.,
 101 Fed. (2d) 929, 937;
Atlantic Terra Cotta Co. v. Masons' Supply Co.,
 180 Fed. 332, 338.

Paragraph 6G 2 of the Hendy Plan contemplates the exercise of certain discretion on the part of the Hendy Board of Directors in connection with the distribution of the stock therein referred to. It has been contended by appellees that the language used gave the Board power to determine whether the affairs of the Hendy Co. had been successfully rehabilitated. Appellants submit that under a proper construction of this Paragraph it was not left to the discretion of the Board to determine whether successful rehabilitation had been accomplished. That is a question of fact to be determined after the intended meaning of the term has first been established, and then only upon a review of matters which occurred *after confirmation of the Plan by the District Court*. The only discretion vested in the Board under this Paragraph of the Plan was to decide, *once successful rehabilitation had been accomplished*, whether or not the managing officers were to receive the stock in question, either in whole or in part. In other words, it was not mandatory upon the

Board to distribute the stock to the managing officers, even if successful rehabilitation was accomplished. This is the only construction consistent with the purpose and intent behind this Paragraph and the Hendy Plan as a whole.

If, on the other hand, the view is taken that under a proper construction of Paragraph 6G 2 the Hendy Board was vested with sole discretion in the matter of determining when and under what circumstances the affairs of the Hendy Co. might be considered as successfully rehabilitated, then it is submitted (in view of events which occurred between the confirmation of the Hendy Plan on March 24, 1936 and December 20, 1940), that determination by the Hendy Board on the last mentioned date that successful rehabilitation of the Hendy Co.'s affairs had been accomplished *was a gross abuse of discretion*.

To arrive at the true intent and meaning of Paragraph 6G 2, it is necessary to consider the situation of the Hendy Co. and of the parties affected by the Hendy Plan at the time that it was approved by the District Court. What did each of these parties expect to receive, and what did they all hope to accomplish through adoption and consummation of the Plan? At the time the Plan was proposed, it is undisputed that the Hendy Co. was insolvent and that its then outstanding stock was presumably worthless. However, immediate liquidation would have resulted in substantial loss to creditors and *total loss to stockholders*. Continuation of the business as a going concern was to the best interests of all concerned.

The objectives of the various parties in interest were as follows:

1. The Hendy creditors wanted their money and a continuing customer with which to do business;
2. The Hendy stockholders wanted a liquid and solvent dividend paying business, with the direction of its policies and affairs restored to their hands.

These objectives could only be accomplished through *a successful rehabilitation of the business as a going concern*, and to this end the Hendy Plan provided:

1. Reduction of all existing obligations, both secured and unsecured, and a deferment of maturity of those obligations for a period of five years from March 24, 1936, and thereafter until such extended obligations were fully paid (see Paragraph 6 of the Plan, Transcript, pages 181 to 187);
2. All outstanding stock was called in and 50% thereof was placed in a voting trust, said voting trust to continue for said five-year period; and thereafter until all deferred obligations of the company were fully paid (see Paragraph 6G 1 of the Plan, Transcript, page 186);
3. The other 50% of the then outstanding stock was to be held by the Hendy Board of Directors under the provisions of Paragraph 6G 2 of the Plan now under discussion. (Transcript, page 187.)

The purpose behind every plan of reorganization approved and confirmed under Section 77-B was to (1) primarily protect the interests of the creditors to the end that they might not suffer undue loss through forced sales, and (2) to preserve the going concern value of the corporation by providing a program whereby administration of the affairs of the corporation might eventually, after payment of creditors' claims, be returned to the stockholders. Each such plan was approved and confirmed upon the premise that it was both equitable and feasible, and that it would be the means of *insuring continued life of the corporation*.

Appellants submit that the above mentioned considerations and purposes were uppermost in the mind of the District Court and in the minds of the parties affected by the Hendy Plan of Reorganization at the time it was approved and confirmed on March 24, 1936. This view is supported by the Plan itself, for in Paragraph 8 thereof (Transcript, page 188), under the title "Effect", it is provided that:

"While this Plan of Reorganization will not expunge any of the liabilities of the debtor corporation by transferring them into capital, it will definitely postpone the payment of both principal and interest receivership obligations * * * for a sufficiently long period *to give the new management an opportunity to resuscitate the debtor corporation*, while at the same time the rate of interest is materially reduced. *The mere deferment of payment does not, of course, satisfy either principal or interest; but it is manifest that the definite postponement of the payment of all interest and*

pre-receivership liabilities for five years (so that, during such period, the debtor corporation will only be required to pay its current operating expenses, taxes, and the small balance of its receivership accounts), will afford the new management a reasonable opportunity for rehabilitation. If the affairs of the debtor corporation cannot be restored within this period, drastic measures, perhaps even abandonment, will be necessary. If, however, substantial progress is made, any necessary further funding should be readily accomplished.” (Italics ours.)

The intent behind Paragraph 6G 2 must be read in conjunction with Paragraph 8 quoted above, and from the latter paragraph it clearly appears that the primary objective of the Hendy Plan was to resuscitate the debtor company as a going concern. Rehabilitation rather than liquidation and abandonment was to be accomplished, if possible, and the debtor company was afforded not only a full initial five-year moratorium period following March 24, 1936 (the Plan confirmation date) within which to accomplish this result, but such additional time thereafter as might appear necessary. (See Paragraph 6 of the Plan, Transcript, pages 183 to 185; also Transcript, page 630.) From Paragraph 8 it is apparent that abandonment and liquidation was considered as a last alternative, to be resorted to only after the expiration of the first five years and then only if no substantial progress toward rehabilitation had been made.

It will now be in order to review the progress of the Hendy Co. following confirmation of the Plan on

March 24, 1936. That the following events occurred is uncontroverted:

1. Between March 24, 1936 and November 15, 1940, approximately \$295,078.40 of the \$570,044.97 of deferred obligations to be satisfied under the Plan had been repaid out of earnings, leaving an unpaid balance of approximately \$274,966.57 yet unpaid on account of said deferred obligations (Transcript, pages 74, 75, 547, 624);

2. On November 15, 1940, over four months yet remained before the five-year deferment period covering the company's obligations under the Plan would expire, that is to say, said five-year period would not have expired until March 24, 1941 (Transcript, pages 839, 840);

3. On November 15, 1940, the company was not in a cash position to pay said remaining balance of \$274,966.57 of deferred obligations (Transcript, page 628);

4. No dividends had been paid or declared in favor of stockholders of the company since confirmation of the Plan on March 24, 1936 (Transcript, page 108);

5. As late as April and July of 1940 (only a few months prior to the Hendy Board's determination of successful rehabilitation on December 20, 1940), Mr. Moores, a member of the Hendy Board and Board representative of The Bank of California, the Hendy Co.'s largest creditor, had rejected the request of appellee Bassick, then President of Hendy Co., that the stock in question here be distributed to the managing officers of the company (Transcript, pages 785, 839, 840);

6. On November 15, 1940, the company's principal and only operating assets, that is to say, its Sunnyvale plant and equipment, were sold to Felix Kahn, assignee for MacDonald & Kahn, Inc., for the sum of \$426,000. (Transcript, pages 110, 111.) This sale required an abandonment of the corporate name "The Joshua Hendy Iron Works" (Transcript, page 825) and constituted a sale of capital assets. It is to be noted that in a previous meeting of the Hendy Board held on November 4, 1940, at which the granting of an option to MacDonald & Kahn, Inc., for the purchase of the Sunnyvale plant was voted (Transcript, page 597 et seq.), appellee Bassick, then President and a Director of the Hendy Co., voted in opposition to the granting of the option (Transcript, pages 599 to 602);

7. After said sale, the debtor company retired the remaining \$274,966.57 of deferred obligations then unpaid. (Transcript, page 550.) Proceeds of sale of the Hendy plant at Sunnyvale had to be resorted to in order to accomplish this (Transcript, page 630);

8. On November 19, 1940, the Directors of the Hendy Co. amended the Articles of Incorporation of the company, changing the name thereof from "The Joshua Hendy Iron Works" to "Hendy Realization Co." (Transcript, page 550);

9. On December 20, 1940, the Directors of the Hendy Co. by resolution declared the affairs of the company to be *successfully rehabilitated* and at the same time proceeded to distribute to appellees Bassick, Hyland and Levit the 2212½ shares of stock here in question, presumably pursuant to Paragraph 6G 2 of

the Hendy Plan (Transcript, pages 112 to 115.) This is the first occasion on which the Hendy Directors had taken any formal action to declare that the affairs of the company had been *successfully rehabilitated* (Transcript, page 621);

10. On December 21, 1940, proceedings were initiated by the Hendy Directors for the voluntary winding up and dissolution of the Hendy Co. (Transcript, page 119.) These dissolution proceedings are still pending at this date.

It is upon these facts that the question of the Hendy Co.'s successful rehabilitation, or lack of it, must be determined.

The word "rehabilitate", according to *Webster's New International Dictionary, 2d edition, unabridged*, means:

"To restore to a former state of solvency, efficiency, or the like; as to rehabilitate a company financially."

The word "rehabilitation" has not frequently been the subject of judicial definition. However, in *New York Title & Mortgage Co. v. Freedman*, 276 N. Y. S. 72 at 74, the court said:

" 'Dissolution' of a corporation is the termination of its corporate existence in any manner, whether by expiration of the charter, decree of court, act of the legislature, etc. Cyc. L. Dict. (2d) p. 318. It becomes civiliter mortuus. 'Liquidation' of a corporation implies the winding up of the affairs of the corporation and settlement with creditors (citing cases). Both involve, imply, intend and contemplate the end of the corporate existence.

On the other hand, '*rehabilitation*' involves, implies, intends and contemplates the continuance of the corporate life and activities, and is the effort to restore and reinstate the corporation to its former condition of successful operation and solvency. See Rehabilitation, Funk & Wagnall's Desk Standard Dictionary (Ed. 1927) p. 656." (Italics ours.)

In *In re Coleman* (D. C. Ky. 1936), 21 Fed. Sup. 923 at 924, the court said:

" 'Rehabilitation' has not found its way into law cases so frequently as 'liquidation', but it has a well defined meaning of little variety. It means to invest or clothe again with some right, authority or dignity; to restore to a former capacity; to reinstate; to qualify again."

In the light of the facts related above, can it in all fairness be said that the affairs of the Hendy Co. had been *successfully rehabilitated* on December 20, 1940 within the meaning of the Hendy Plan, as determined by the Hendy Board on that date? We think not. Prior to December 20, 1940, the Hendy name, the Hendy manufacturing plant and all other of its corporate capital assets had been sold, dissolution proceedings had been commenced, and the going concern value of the company had thus, for all time, been destroyed. Proceeds of this sale had to be resorted to in order to repay deferred liabilities of \$274,966.57 then outstanding. The primary purpose of the Hendy Plan—successful rehabilitation—was therefore defeated, not accomplished, and all possibility of accomplishment was definitely eliminated. Under these

circumstances, it necessarily follows that distribution of the Hendy stock in question to the defendant managing officers was unwarranted, illegal and void.

5. THE INJUNCTIVE RELIEF GRANTED APPELLEES EXCEEDS THE ISSUES RAISED IN THESE CONSOLIDATED PROCEEDINGS.

Irrespective of the questions heretofore raised in this brief regarding the jurisdiction of the District Court and regarding the propriety of its judgment entered herein on the merits, the scope of the injunctive relief granted appellees under said judgment is too broad and goes far beyond any of the issues raised by the pleadings and the relief prayed for by appellees in their petitions of February 19 and March 11, 1941. These consolidated causes deal solely and exclusively with the propriety of the distribution to appellees Bassick, Hyland and Levit on December 20, 1940 of 2212½ shares of Hendy stock, as previously discussed in this brief. Under said petitions of February 19 and March 11, 1941, appellees sought only to have appellants permanently enjoined from further prosecuting the State Court actions therein specifically described (and already discussed in this brief), it being claimed that these actions constituted attempted interferences with various orders and decrees of the District Court in the old Hendy reorganization proceeding.

A determination of the propriety or impropriety of the salaries, bonuses and cash paid by appellee Hendy Realization Co. to appellees Bassick, Hyland and

Levit between March 24, 1936 (the Hendy Plan confirmation date) and November 15, 1940 (the date of sale of the Hendy assets) is not prayed for by any party to these consolidated causes, and is not in any way involved here. This was conceded by Mr. Ferguson, one of appellees' counsel, in his opening statement to the District Court at the commencement of the trial. Mr. Ferguson stated:

“Now, the cash distribution is not here involved. The only thing involved is the stock.” (Transcript, page 525.)

Yet under Consolidated Findings of Fact Nos. XI (Transcript, page 108), XII (Transcript, page 109) and XVI (Transcript, page 118), and under Consolidated Conclusion of Law No. 3 (Transcript, page 128), the District Court has found and concluded as a matter of law not only that this stock distribution was proper, but likewise that certain salaries, bonuses and cash distributions to appellees Bassick, Hyland and Levit were likewise proper, and in the judgment of November 15, 1941 appellant Shores and Behneman are restrained and enjoined from “* * * taking or doing any and all acts and/or from the commencement or continuation of any and all proceedings interfering with or attacking the order of the above entitled court dated March 24, 1936, or the enforcement thereof, and/or the distribution of 2212½ shares of the capital stock of Hendy Realization Co., to the managing officers of said corporation pursuant thereto and/or the rights of petitioners and defendants W. R. Bassick, E. M. Hyland, and Morris Levit, the distributees of

said capital stock *and/or the distribution of salaries, bonuses, and cash to petitioners and defendants W. R. Bassick, Elmer M. Hyland, and Morris Levit * * **” (Italics ours.) (Transcript, page 135.)

It will be noted from the italicized portion of the above quoted language of the judgment that appellants are now forbidden from commencing *or continuing* any proceedings attacking the payment of said salaries, bonuses and cash to appellees Bassick, Hyland and Levit, yet it is clear from the record that this prohibition is improper and unwarranted, and goes far beyond the issues presented in these consolidated causes, as pointed out above. There is presently pending in the State Court an action entitled “Behne-man, et al. v. Hendy Realization Co., et al.”, San Francisco Superior Court No. 303,651 (not previously discussed in this brief), through which the sole question of the propriety of said bonus and cash payments to appellees Bassick, Hyland and Levit, as well as to certain other employees not parties to these proceedings, is directly presented. In that action, which was commenced on July 18, 1941, only approximately two months before the trial of these consolidated causes, the same individual appellees in these proceedings are named as defendants. The pendency of this State Court action was recognized and referred to by appellees’ counsel at the time of trial, and it was conceded at that time that the cash and bonus distribution issue was involved only in said State Court action, and not here. Mr. Ferguson, of appellees’ counsel, after making the statement quoted above, continued as follows:

“These same counsel and these same parties have filed another action in the State Court involving the cash distribution, so it is not here before your Honor. We think they all should be here, but it was recently filed, it is not at issue. The question might be determined here, but the fact is that cash distribution is not here involved. *The sole question is the distribution of that stock.*” (Transcript, pages 525, 526.)

At another point during the trial when evidence was offered by appellants regarding these cash distributions made by the Hendy Directors to appellees Bassick, Hyland and Levit on December 4, 1940—this only for the purpose of showing the cash position of the Hendy Co. at that time—the following colloquy occurred between court and counsel:

“Mr. Jordan. Will you stipulate that at a meeting of the board of directors of the company held on December 4, 1940, additional compensation for the year 1940 was voted to the defendants, Bassick, Hyland and Levit in the following amounts: Mr. Bassick, \$40,000; Mr. Hyland, \$20,000; Mr. Levit \$20,000?”

Mr. Ferguson. No, I won't so stipulate. That was not the fact. The fact was, and the resolution shows that that was voted to them, not for 1940, but for the entire time from the time of reorganization, from March, 1936, and the resolution so shows.

Mr. Jordan. I propose to introduce that resolution later, Mr. Ferguson, and in any event it will speak for itself.

The Court. If you have it why don't you introduce it now?

Mr. Jordan. I am about to read, if counsel permits, from the sworn answer to interrogatories propounded by respondents Behneman and Shores in this matter some time ago.

The Court. I am wondering if the record is not here.

Mr. Jordan. I am perfectly willing to read it from the minute book. I assume that these, having been prepared by counsel, would be correct.

Mr. Ferguson. That is an exact copy. I would like to inquire what the purpose of this line of inquiry is, because these payments are not involved in this case. Counsel has another suit, as I stated, pending in the State Court.

Mr. Jordan. I believe that the court will be interested in knowing exactly what became of the proceeds of the sale of the plant, and I propose to connect this later on by showing that the only way that they could have paid \$300,000 on December 4, 1940, was by resorting to the proceeds of the sale of the plant; in other words, a sale of the capital assets. This money did not come out of earnings; it could not have, because they did not have enough on hand to pay it. We expect to prove they dipped into the proceeds of the sale of the plant to pay off \$274,000 odd that they still owed under the provisions of the plan which were to entirely mature in a matter of four or five months. Therefore, I think it is highly material to the court, and your Honor so ruled when you overruled the objections to that interrogatory.

The Court. Do you make that as an objection?

Mr. Ferguson. I object, in the first place, to this line of inquiry on the ground that the bonuses are not here involved. We have no desire to deprive the court of all the facts, but we must not

try other cases with this case. The second point is, this claim is going to involve an accounting of that year to determine where the money came from to pay that.

The Court. How are you going to ascertain that without examining the books?

Mr. Jordan. I believe that I can establish by evidence that if the proceeds of the sale of their particular assets had not come into the company it would have been impossible for them to have declared a bonus or additional sums of \$103,000 and at the same time, within a matter of days, also paid off all the remaining obligations under their plan of reorganization.

The Court. I will overrule the objection. You are now going to read from the answer to the interrogatories." (Transcript, pages 550 to 553.)

It is clear from the foregoing statements of the court and counsel that evidence regarding the additional compensation payments made to appellees Bassick, Hyland and Levit on December 4, 1940 was offered, and admitted, for the limited purpose of showing that in December of 1940 the Hendy Co. could only have made cash disbursements aggregating over \$375,000 (inclusive of deferred obligation and additional compensation payments) by resorting to the proceeds of sale of the capital assets of the company. Obviously, this evidence was neither offered nor admitted for the purpose of determining the propriety or impropriety of said additional compensation payments.

The reason for appellees desiring the insertion of the broad language of the judgment quoted and italicized above is, of course, understandable and obvious.

If permitted to stand, said language is so broad that the further prosecution of the last mentioned State Court action will be forever barred. By the same token, appellants herein, as plaintiffs in said State Court action, will be deprived of their right to a judicial determination of the issues there presented—issues admittedly in no way involved in these consolidated causes. It is accordingly submitted that, irrespective of the ruling of this court on the other matters raised by this appeal, the italicized portion of the above quoted language of the judgment entered herein should be deleted, to the end that appellants may be free to prosecute said State Court action involving the propriety of said bonus and cash payments to a final determination on the merits.

CONCLUSION.

From the facts and arguments stated above, and in view of the authorities cited, appellants draw the following conclusions:

1. That the District Court had no jurisdiction over the subject matter of the petitions filed by appellees in the old Hendy reorganization proceeding on February 19 and March 11, 1941, and accordingly erred in denying appellants' motion to dismiss the same; and that the District Court likewise erred in denying appellants' motion to dismiss said petitions for the reason that the individual petitioners, appellees herein, failed to properly intervene in said Hendy reorganization proceeding;

2. That the District Court had no jurisdiction over the subject matter of the Shores action, there being no "federal question" there involved, and accordingly erred in denying appellant Shores' motion to remand said action to the State Court from which it was removed;

3. That the District Court erred in finding and decreeing on the merits of these consolidated causes that the affairs of the Hendy Co. had been successfully rehabilitated on December 20, 1940, and that the 2212½ shares of Hendy stock here in question were properly distributed to appellees Bassick, Hyland and Levit;

4. That the propriety or impropriety of the bonus and cash payments made by the Hendy Co. to appellees Bassick, Hyland and Levit between March 24, 1936 and December 20, 1940 is not an issue in these consolidated causes and, accordingly, that the District Court erred in including in the permanent injunction entered herein that portion thereof restraining appellants from the commencement or continuation of any proceedings attacking the payment of said bonuses and cash.

Appellants accordingly submit that the judgment of the District Court should be reversed.

Dated, San Francisco, California,
August 19, 1942.

Respectfully submitted,

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Attorneys for Appellants.

No. 10,085

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GLADYS M. SHORES and HAROLD M. F.
BEHNEMAN,

Appellants,

vs.

HENDY REALIZATION Co., a corporation
(formerly the Joshua Hendy Iron
Works), A. J. MAYMAN, C. B. MOORES,
E. PRICE, A. E. WEBBER and W. R.
BASSICK, individually and as the Di-
rectors of Hendy Realization Co.,
ELMER M. HYLAND and MORRIS LEVIT,
Appellees.

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FILED

SEP 28 1942

PAUL P. O'BRIEN,

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Works), A. J. MAYMAN, C. B. MOORES,
E. PRICE, A. E. WEBBER and W. R.
BASSICK, individually and as the Di-
rectors of Hendy Realization Co.,
ELMER M. HYLAND and MORRIS LEVIT,

Appellees.

BRIEF FOR APPELLEES.

These consolidated causes involve two questions—first, the jurisdiction of the district court, and, second, whether or not the judgment of the district court is correct upon the merits. No attack was made upon the merits of the judgment until the question of the contents of the record was brought before this court. But, despite the fact that appellants' attack upon the merits is an afterthought, its inclusion in appellants' brief necessitates a full consideration of the facts.

Appellants' purported statement of facts in the "Jurisdictional Statement"¹ does not give the facts of the case.

It consists mainly of a recapitulation of the allegations in a number of appellants' pleadings which are of no significance upon this appeal. Accordingly it is necessary for us to state the facts.

Because of the volume of the record, a detailed statement of the whole of the evidence is, of course, impracticable; but the salient features are chronologically summarized in the following statement.

STATEMENT OF FACTS.

Appellee Hendy Realization Co., a California corporation (formerly and until 1940 The Joshua Hendy Iron Works), was incorporated in 1906² and, until the sale of its plant in 1940, continuously engaged in a general machinery and foundry business, with its plant at Sunnyvale, California.³

Although the company continuously engaged in business, it never paid a dividend upon its stock;⁴ and in 1932 the company was thrown into an equity receivership in the state court.⁵ In the receivership proceedings F. J. Behneman (the father of appellant Harold M. F. Behneman), who had for many years been the president and general manager of the company, was appointed receiver. F. J. Behneman died in 1934, and appellee W. R. Bassick was appointed his successor.⁶

¹Appellants' Brief p. 1 et seq.

²Tr. p. 175.

³Tr. p. 533.

⁴Tr. p. 573.

⁵Tr. pp. 175, 203.

⁶Tr. p. 417.

On March 4, 1935, and while the state receivership was still pending, an involuntary petition was filed in the district court by the major creditors of the corporation and proceedings were taken for its reorganization pursuant to Sections 77A and 77B of the Bankruptcy Act.⁷ Appellee W. R. Bassick was appointed trustee for the company and actively managed its business.⁸ This bankruptcy proceeding is one of the two consolidated causes now before this court.

As the result of this proceeding a plan of reorganization was duly adopted and confirmed by the district court on March 24, 1936.⁹ Both appellants, who had become stockholders by virtue of having received their stock from their parents, appeared as stockholders at the hearings upon the plan—appellant Gladys M. Shores to accept and approve the plan in writing under oath,¹⁰ and appellant Harold M. F. Behneman as the only stockholder to oppose the plan.¹¹

At the time that the plan of reorganization was confirmed the district court and the parties were confronted with a debtor corporation which, under the long management of F. J. Behneman, appellant Behneman's father, had so managed its affairs that:

(1) In twenty months' operations the corporation had lost \$183,000.00;¹²

(2) The physical assets of the corporation had been so wasted that:

⁷Tr. p. 203.

⁸Tr. p. 204.

⁹Tr. p. 201.

¹⁰Tr. p. 200.

¹¹Tr. pp. 169, 154.

¹²Resp. Ex. No. B; Plff. Ex. No. 3A.

“In 1934 the plant was in a deplorable condition. In fact, when Mr. Bassick took charge there was not a man working on any profitable job in the organization. It was simply flat. That was the condition when he came to the plant for the first time, all of the tools, when I say ‘all of the tools,’ I should say practically all of the tools were so run down that they were not capable of producing any work with sufficiently close tolerances to meet the customers’ requirements. From 1934 until 1936 some progress was made toward rebuilding those tools and fixing them up, but there was very little money available, therefore not much progress was made.”¹³

(3) The books of the corporation did not reflect actual values or conditions; as, for example, “there had been no consistent depreciation period, that in some years no deductions were made for depreciation, some years round sums were deducted, and still other years odd amounts which could not be substantiated.”¹⁴ The books were, in fact, so unreliable that the special master in the reorganization proceedings recommended and procured the appointment of an independent valuation engineer to report upon actual values and conditions;¹⁵

(4) The corporation had outstanding obligations of \$644,732.27, plus accrued interest thereon;¹⁶ and

(5) The corporation was insolvent and its stock was worthless. This the special master and the district court expressly found and held,¹⁷ and this appellants now con-

¹³Tr. p. 724.

¹⁴Tr. pp. 869, 435-7, 798-801, 690-695.

¹⁵Tr. pp. 467, 470-3, 475-9.

¹⁶Tr. p. 531.

¹⁷Tr. pp. 159-166, 201, 697-8.

cede,¹⁸ and in the reorganization proceedings conceded,¹⁹ although they vigorously contended otherwise during the trial.²⁰

Since the corporation was insolvent, the plan of reorganization first provided that all of the corporation's creditors should scale down their obligations either 10% or 15%, depending upon whether such obligations were secured or unsecured—a total reduction of \$76,401.00—and receive long-term notes for such reduced obligations bearing a substantially smaller rate of interest, and in certain instances no interest.²¹ This was done, and pursuant to the plan of reorganization the creditors gave up a substantial part of their claims and slashed the interest on the remaining balance.

Since the stock of the corporation was worthless, the plan of reorganization provided, among other things:²²

“G. Capital stock.

4425 shares of the capital stock of the debtor corporation are now outstanding, said shares having a book value of \$212,898.51, but no actual value.

In consideration of the extensions granted by the creditors and of the reduction of their claims in the sum of \$73,853.06, as aforesaid, the stockholders shall appropriately endorse and deliver the stock held by them to the Board of Directors of the debtor corporation, appointed as hereinafter provided, to be held by said Board as follows:

1. 50% of the shares so deposited by each stockholder shall be held in trust and voted by said

¹⁸Appellants' Brief p. 55.

¹⁹Tr. pp. 462, 696-7.

²⁰Tr. pp. 655-6.

²¹Tr. pp. 181-6.

²²Tr. pp. 186-7.

Board for a period of 5 years, and thereafter until the extended obligations are fully paid, so as to leave the management of the debtor corporation during such period in the hands of its creditors. The Board shall have full power to vote said stock, including the power to vote for a reorganization of the capital structure of the debtor corporation so as to provide, at any time, for an issue of one or more classes of preferred stock and the exchange therefor of any part or all of the unsecured liabilities of the debtor corporation. Upon the expiration of 5 years and the payment in full of the extended obligations, such shares shall be returned to their respective owners.

2. The remaining 50% of the shares so delivered by each stockholder shall be held by said Board free and clear of any claim, right, title, or interest therein by such stockholder, to be distributed by said Board, in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company's affairs."

Pursuant to the terms of the order dated March 24, 1936, confirming the plan of reorganization, all of the then stockholders of the corporation, with the exception of appellant Harold M. F. Behneman, endorsed and delivered their stock to the directors of the corporation who thereafter held it as trustees pursuant to the terms of the confirmed plan of reorganization; and the depositing stockholders executed a confirming trustees' receipt and certificate with the board of directors as voting trustees, so that the stock deposited by each of them was held by such trustees 50% in trust for such depositing stockholders and 50% free and clear of any claim, right,

title, or interest therein by such stockholders as provided by, and for the purposes provided by, the plan of reorganization.²³ Appellant Harold M. F. Behneman refused similarly to endorse and deliver his stock, standing in his father's name, until June, 1940.²⁴

On January 27, 1937, the district court made its "Final Decree, etc." in the reorganization proceedings, to which decree reference will hereafter be made.²⁵

Immediately following the confirmation of its plan of reorganization, the corporation, through its individual directors, made arrangements with appellees W. R. Bassick, Elmer M. Hyland, and Morris Levit, its president and vice presidents in charge of sales and manufacturing, by which each agreed to scale down and take, for the time being, less than the compensation to which each was entitled. These arrangements were made upon the express understanding that such concession was being temporarily made so as to assist in the rehabilitation of the corporation's affairs, and that as soon as the affairs of the corporation warranted, this partial compensation would be supplemented by cash bonuses or distributions and by the distribution of the capital stock of the corporation held by the board of directors as voting trustees.²⁶

Appellees Bassick, Hyland, and Levit accordingly served as the managing president and vice presidents of the corporation from that time and until November 15, 1940,²⁷ receiving only partial compensation for their services in

²³Tr. pp. 756-757, 544.

²⁴Tr. pp. 544, 681.

²⁵Tr. p. 225.

²⁶Tr. pp. 740-752, 761-790, 815-845, 716-724, 727-735, 704-716, 613-622, 610, and Resp. Ex. Nos. A, E, E-1, E-2, E-3, E-4, E-5.

²⁷Tr. pp. 576, 580, 594, 541-2.

accordance with such arrangement. It is true that during this period there were minor adjustments made on account of their salaries, and minor bonuses paid, but the evidence is uncontradicted that it was understood that these payments were only on account of their partial compensation, and that there were, during these years, many conferences between the managing officers and the directors regarding the officers' compensation, in the course of all of which conversations the understanding was confirmed that such officers would ultimately be paid, by distribution of cash and the stock held by the voting trustees, for the balance due them on account of the services rendered by them throughout these years.²⁸

The business and affairs of the corporation under the direction of its new board of directors, and under the management of its new president, appellee Bassick, and its vice presidents, appellees Levit and Hyland, steadily improved.²⁹ For example:

(1) The corporation had, between June 30, 1936, and November 15, 1940, a net profit before depreciation of approximately \$350,000.00, and had a net income after adequate depreciation and interest deductions of almost \$200,000.00.³⁰ This may be compared with the \$183,000.00 lost by the corporation in the twenty months preceding its reorganization;³¹

(2) Not only had the corporation paid all interest upon its receivership obligations, but it had paid off

²⁸Tr. pp. 740-752, 761-790, 815-845, 716-724, 727-735, 704-716, 613-622, 610.

²⁹Its comparative balance sheets are in evidence; Plff. Ex. Nos. 3, 3A, 3B, 3C, 3D, 3E, 3F; Resp. Ex. Nos. B, C; and summaries therefrom, Resp. Ex. Nos. F, G, H, I.

³⁰Resp. Ex. Nos. H, F; Tr. pp. 801-6, 849.

³¹Resp. Ex. No. B; Plff. Ex. No. 3A.

more than 50% of these obligations, without refinancing—a payment of more than \$300,000.00;³²

(3) The net worth of the corporation had risen from a **minus**³³ \$61,787.36 in 1936 to a net worth of \$206,330.87 at the beginning of November, 1940. In other words, the outstanding stock of the corporation which was **absolutely worthless** at the time of its reorganization, had, by dint of appellees' management, become worth \$206,330.87;³⁴

(4) And in addition to all this, and out of operating revenues, and not capital investment, the physical plant of the corporation had been brought back. After testifying to the "deplorable condition" of the plant with which the new management was presented, the plant superintendent testified:³⁵

"When the reorganization plan became effective in 1936 we really started in then to overhaul the plant and tools, as well as the building, and I think I can safely say that 90 per cent. of the machine tools in that plant were overhauled and the expense charged as an operating expense of the plant, and also the buildings were in such shape that they were really unsafe for the overhead electrical cranes to travel in the building, and necessitated reenforcing the building as well as the foundation, all of which expense was absorbed as operating expense of the plant."

This, then, was the situation in November, 1940, when the corporation was approached by Mr. Felix Kahn, of MacDonald & Kahn, with a proposal to purchase the

³²Resp. Ex. Nos. I, G; Tr. pp. 805-8, 849.

³³Emphasis ours throughout this brief unless otherwise stated.

³⁴Resp. Ex. Nos. H, F; Tr. pp. 801-6, 849.

³⁵Tr. p. 725.

Sunnyvale plant of the corporation.³⁶ The board of directors of the corporation was then, and throughout the remaining transactions, comprised of appellees C. B. Moores, A. J. Mayman, and W. R. Bassick, nominated by the secured creditors; appellee E. Price, nominated by the unsecured creditors; and appellee A. E. Webber, nominated by the old stockholders. On November 4, 1940, after a meeting of the board of directors, the corporation granted an option to Felix Kahn, trustee, for \$10,000.00, to purchase the Sunnyvale plant of the corporation for the sum of \$426,000.00 cash, subject to the usual adjustments for inventory, work in progress, etc.³⁷

On November 13, 1940, the corporation notified all of its stockholders, including appellants, that it had granted such option, and that it proposed to sell the Sunnyvale plant and property. No objection to such sale was received.³⁸

On November 15, 1940, MacDonald & Kahn, the assignee of Felix Kahn, trustee, exercised the option and paid the balance of the purchase price of \$426,000.00.³⁹ On the same date, meetings were held by the corporation's stockholders, its board of directors, and its voting trustees holding its stock pursuant to the plan of reorganization, at which meetings the sale of the Sunnyvale plant and property was approved and confirmed.⁴⁰ Although notice of such intended action had been mailed to all stockholders, no protest or objection was made by either of appellants.⁴¹

³⁶Tr. pp. 595-6.

³⁷Tr. pp. 597, 603.

³⁸Tr. pp. 866-7, 809, 811.

³⁹Tr. pp. 533, 547-9, 812.

⁴⁰Tr. p. 548; Plff. Ex. No. 6.

⁴¹Tr. pp. 866-7, 811.

The profit to the corporation on the sale of its Sunnyvale plant was approximately \$131,000.00;⁴² and the realization of such profit increased the net worth of the company, and of its originally valueless stock, to \$335,825.33.⁴³

On November 19, 1940, the corporation, in accordance with the terms of sale, by meetings of its directors and stockholders, authorized the change of its name from The Joshua Hendy Iron Works to Hendy Realization Co.⁴⁴

On December 2, 1940, and December 4, 1940, the corporation's board of directors, taking an intervening adjournment, considered at length the payment of proper compensation to the officers and employees of the corporation,⁴⁵ and as a result authorized the distribution of an aggregate of \$102,100.00 to twenty-two of its officers and employees.⁴⁶ This distribution was made and, pursuant to their understanding and arrangement with the corporation, the managing president and vice presidents of the corporation participated therein to the following extent:

Appellee W. R. Bassick	\$40,000.00,
Appellee Elmer M. Hyland	20,000.00,
Appellee Morris Levit	20,000.00.

The major considerations actuating this cash distribution by the board of directors were partially summarized in the minutes of the meetings of December 2, and December 4, 1940, as follows:

⁴²Tr. p. 860.

⁴³Resp. Ex. Nos. H, F; Tr. pp. 801-6, 849.

⁴⁴Tr. p. 530.

⁴⁵Tr. pp. 815-817, 553-557.

⁴⁶Including two employees added at a directors' meeting held December 20, 1940; Tr. p. 557.

December 2, 1940:⁴⁷

“Director C. B. Moores then called the following facts to the attention of the Board of Directors:

(1) That certain of the officers and employees of the corporation have, since its reorganization, rendered extremely valuable services to the corporation resulting in its rehabilitation as a sound and going business, and the improvement of the financial condition of the company from a point where the stockholders of the company had little or no equity as evidenced by the records of the reorganization of the corporation under Section 77B of the Bankruptcy Act, to a point where the equity of the stockholders has become very substantial;

(2) That it was this rehabilitation of the corporation's business, so occasioned, which made possible the advantageous sale of the Sunnyvale plant and properties of the corporation, just consummated;

(3) That notwithstanding the value of such services to the corporation, the compensation of such officers and employees has not been commensurate therewith; and that the board, through its directors, has repeatedly represented to such officers and employees that the compensation received by them during said period would be supplemented by additional payment therefor as soon as in the opinion of the board such further payment was practicable and expedient;

(4) That, in addition, due to the sale of the corporation's Sunnyvale plant and properties, the employment of said officers and employees has necessarily been abruptly severed and their vacation and other rights interfered with;

⁴⁷Tr. pp. 815-817.

And he suggested that, since the affairs and position of the corporation now warranted the board's action in such connection, the board consider the proper payment and reward of such officers and employees on account of their said services and in relation to their respective contributions to the restoration of the corporation. This being the consensus of the meeting, an extended and detailed discussion upon the matter was thereupon had, all directors participating, in an effort to work out a definitive plan for such payment commensurate with the best interests of the corporation and the fair and proportionate payment and reward of such officers and employees. Various tentative proposals in this regard were made and considered, and thereupon, and upon motion duly made, seconded, and unanimously carried, the meeting was duly adjourned to Wednesday, December 4, 1940, at eleven o'clock, A. M., in order that the directors should have an opportunity to further consider and weigh said proposals prior to, and so as to enable, matured and final action thereupon."

December 4, 1940:⁴⁸

"The President stated that the first business of the meeting was the consideration of Mr. Moores' suggestion under advisement at the previous meeting, and the various proposals presented at the meeting of the Board of Directors on December 2, 1940, relative to the compensation of certain of the officers and employees of the corporation. Further discussion upon the matter was thereupon had, at the conclusion of which it was moved by Director C. B. Moores, seconded by Director A. Webber, and unanimously carried—Director W. R. Bassick, however, expressly not participating in said vote—that the following

⁴⁸Tr. pp. 553-7.

resolution be adopted (expressly, however, without prejudice to the right of the Board, acting as Voting Trustees pursuant to the confirmed plan of reorganization of the corporation, to further reward the managing officers of the corporation for their services by the distribution of capital stock of the corporation as provided, inter alia, in Paragraph G-2 of said plan of reorganization):

‘Whereas, the financial position, business, and affairs of this corporation have, since its reorganization, evidenced steady and substantial improvement to the point that they have become sound, businesslike, and satisfactory in condition; and

Whereas, the achievement of this fact has been made possible only by the unselfish and unremitting efforts and diligence of certain of its officers and employees since its reorganization; and

Whereas, throughout this entire period, this corporation has not paid such officers and employees for their services in accordance with the full value thereof to this corporation, but said officers and employees have been paid therefor and have accepted substantially less than the value of their said services to this corporation in consideration of the fact, and upon the representation of this Board of Directors, that a further payment, which with the amount already paid, would constitute a fair payment therefor, would be made at a later but the earliest expedient date; and

Whereas, the affairs and position of this corporation are now such that said officers and employees can be paid for their said services, and it is fair and just that said officers and employees should be rewarded for their said services and paid therefor, and for the severance of their employment and interference with their vacation and

other rights occasioned by the sale of the Sunnyvale plant and properties of this corporation; and

Whereas, it appears to be for the best interests of this corporation that the following resolution be adopted:

Now therefore, be it resolved, that this corporation forthwith pay the following amounts to the following of the officers and employees of this corporation in recognition, appreciation, payment, and reward for their exemplary and valuable services to this corporation:

W. R. Bassick	\$40,000.00
E. M. Hyland	20,000.00
M. Levit	20,000.00
C. B. McAulay	10,000.00
C. E. Birkenbeul	3,000.00
J. M. Brown	3,000.00
J. L. Whitehead	1,000.00
R. N. Parkin	1,000.00
Frank L. McAdam	500.00
Margaret Terry	500.00
C. Cortage	500.00
A. R. Sillers	500.00
W. C. Theller	500.00
R. M. Spedding	500.00
L. A. Wall	100.00
Grace Miguelgorry	100.00
Juliette del Castillo	100.00
Ruth Barbier	100.00
Gerda Mangels	100.00
Thelma Broeder	100.00

And be it further resolved, that the officers of this corporation be and they are hereby authorized and directed to take such steps and to make such payments as shall be necessary or desirable to effectuate and carry this resolution into effect.' "

While these were the chief considerations, testimony as to additional considerations appear throughout the record; as, for example, that the corporation had ceased business and was contemplating dissolution; and that if each of those employees who might be entitled to receive stock in the opinion of the board were to have stock distributed to him it would require rather involved complications and would necessitate, after he received stock, his participation in liquidating dividends, so that the board determined to adjust the compensation to approximately the amount which such employee would have received as liquidating dividends on the stock.⁴⁹ Throughout the entire record, however, there is repeated testimony that this cash distribution was, particularly in the case of its managing officers, a supplemental and partial compensation for the underpaid services of those officers rendered pursuant to their understanding and arrangement with the corporation.⁵⁰

On December 20, 1940, the board of directors of the corporation authorized and distributed the 2212½ shares of stock held by them, as voting trustees, for the reward of management pursuant to the terms of the plan of reorganization. The resolution authorizing this distribution of stock, and the consideration of the board of directors in so resolving were stated in its minutes as follows:⁵¹

“Upon motion duly made, seconded, and unanimously carried, Director W. R. Bassick, however,

⁴⁹Tr. pp. 818-9.

⁵⁰Tr. pp. 740-752, 761-790, 815-845, 716-724, 727-735, 704-716, 613-622, 610, and Resp. Ex. Nos. A, E, E-1, E-2, E-3, E-4, and E-5.

⁵¹Tr. pp. 564-8.

expressly not participating in the vote, the following resolution was adopted:

‘Whereas, under the terms of the confirmed plan of reorganization of this corporation and the Voting Trust created pursuant thereto, 2212½ shares of the capital stock of this corporation are now held by this Board, as Voting Trustees, free and clear of any claim, right, title, or interest therein by the former stockholders surrendering the same, and subject to the distribution by this Board, in its sole discretion, either in whole or in part to the managing officers of this corporation as a reward for their management and the successful rehabilitation of the corporation’s affairs; and

Whereas, the officers of this corporation hereinafter named have, since its reorganization, rendered extremely valuable services to, and in the management of, the corporation, resulting in its rehabilitation as a sound and going business, and the improvement of the financial condition of the corporation from a point where the stockholders of the corporation had no equity, as evidenced by the records of the reorganization of the corporation under Section 77B of the Bankruptcy Act, to a point where the equity of the stockholders has become very substantial; and

Whereas, the financial position, business, and affairs of this corporation have, since its reorganization, evidenced steady and substantial improvement to the point that they have become rehabilitated, sound, business-like, and satisfactory in condition, and such rehabilitation of the corporation’s business so occasioned has made possible the advantageous sale of the Sunnyvale plant and properties of the corporation just consummated; and

Whereas, notwithstanding the value of such services to this corporation, the compensation of such officers has not been commensurate therewith, and this Board, through its Directors, has repeatedly represented to such officers that the compensation received by them during said period would be supplemented by additional reward as soon as in the opinion of the Board such further reward was practical and expedient; and

Whereas, in addition, due to the sale of the corporation's Sunnyvale plant and the properties, the employment of certain of said officers has necessarily been severed, and their vacation and other rights interfered with; and

Whereas, it appears just and proper that said 2212½ shares of the capital stock of this corporation held by this Board, as aforesaid, be issued to said managing officers, subject to the condition hereinafter set forth, as a reward for their successful management and rehabilitation of the corporation's affairs; and it appears to be for the best interests of this corporation that the following resolution be adopted;

Now therefore, be it resolved, that this Board forthwith distribute said 2212½ shares of the capital stock of this corporation so held by it to the following persons in the respective amounts hereinafter set forth, in recognition, appreciation, payment, and the reward for their exemplary and valuable services to this corporation and as a reward for their management and the successful rehabilitation of the corporation's affairs:

W. R. BASSICK	812½ shares
E. M. HYLAND	700 shares
M. LEVIT	700 shares;

provided, however, that each such person shall, prior to, and as a condition precedent to, receiving such distribution of stock, waive in writing the right of such person to receive any dividends or distribution upon said stock out of the first \$85,848.75 available for dividends or distribution upon the capital stock of this corporation, in dissolution or otherwise, so that the said sum of \$85,848.75 may be prorated and paid by way of dividend, distribution, or otherwise (or set aside for such payment), only to the holders of the remaining 1907 $\frac{3}{4}$ shares of the outstanding stock of the corporation now held by this Board as Voting Trustees, to the end that said persons holding said 2212 $\frac{1}{2}$ shares hereby distributed shall only participate in dividends or distributions upon the capital stock of this corporation made in excess of said sum of \$85,848.75, as aforesaid.

And be it further resolved, that the President or Vice-President and the Secretary or Assistant Secretary of this corporation be and they are hereby authorized and directed, for and on behalf of this Board, to take all such steps and to execute all such documents as may be necessary or desirable to effectuate the distribution, transfer, and delivery of said stock to said officers, as aforesaid, and to fully effectuate the purposes of this resolution.' ''

Pursuant to this resolution the board of directors, as voting trustees, on December 20, 1940, distributed 812 $\frac{1}{2}$ shares of stock to appellee W. R. Bassick, the corporation's president and general manager, 700 shares to appellee Elmer M. Hyland, the corporation's vice president in charge of manufacturing, and 700 shares to appellee Morris Levit, the corporation's vice president in charge of sales; first receiving, however, waivers executed by

each of these officers waiving his right to receive liquidating dividends on the stock to the extent of the first \$85,848.75 available for dividends—that is to say, waiving his right to participate in the first \$45.00 of liquidating dividends paid by the corporation.⁵² This waiver was required by the board, and executed by the recipients of the stock, in consideration of the fact that they had already received a cash distribution deemed to offset the amount which they would have received upon such stock had they not waived such dividend.⁵³

None of the persons so receiving cash or stock was a member of the board of directors except the president, appellee W. R. Bassick, and he did not participate in any of the voting.⁵⁴

On the same day, December 20, 1940, at a meeting of the stockholders of the corporation, it was elected that the corporation wind up its affairs and dissolve, and accordingly the dissolution of the corporation was commenced.⁵⁵

On December 21, 1940, the board of directors, as voting trustees, determined that since the plant of the corporation had been sold, the corporation's creditors paid, and the purposes of the trust thus accomplished, it should and did terminate the voting trust⁵⁶ under which it held the 1907¾ shares of stock, beneficially owned by the old stockholders.⁵⁷

⁵²Tr. pp. 568, 819-821.

⁵³Tr. p. 821.

⁵⁴Tr. pp. 553, 564.

⁵⁵Tr. p. 570.

⁵⁶Tr. pp. 570-1.

⁵⁷Originally 2212½ shares were so held, but the beneficial interest in 304¾ shares was surrendered to the corporation by one of its stockholders in satisfaction of the obligation of the stockholder to the corporation (Tr. p. 569).

On the same date, December 21, 1940, the board of directors declared a first liquidating dividend of \$85,-848.75, or \$45.00 per share, upon the 1907 $\frac{3}{4}$ shares so beneficially owned by the old stockholders—expressly providing that, pursuant to the waivers executed by the appellee managing officers now owning the remaining 2212 $\frac{1}{2}$ shares, the dividend should not be paid upon the remainder of the outstanding shares.⁵⁸

Thereafter, and on or about December 23, 1940, the corporation issued the new shares to which the old stockholders were entitled in exchange for their original stock, (the new shares being for 50% of their original holdings pursuant to the plan of reorganization), and thereafter delivered the exchange certificates to the old stockholders, together with a first cash liquidating dividend of \$45.00 per share upon each of these shares.⁵⁹ Without objection, each of the appellants claimed and received the liquidating dividend upon his stock, amounting to \$1,365.75 in the case of appellant Gladys M. Shores, and \$28,001.25 in the case of appellant H. M. F. Behneman; a total of \$29,367.00 to appellants upon the stock which was worthless at the time of reorganization.

A further liquidating dividend may be paid when the remaining non-operating property of the corporation is disposed of and outstanding taxes and expenses are satisfied. The amount of such a dividend is a matter of estimate at this time, but the testimony in this record is that in all probability it will not exceed \$10.00 per share.⁶⁰

⁵⁸Tr. p. 571.

⁵⁹Tr. pp. 571, 683-7.

⁶⁰Tr. pp. 822, 632.

Development of the Consolidated Causes Now Before the Court.

On January 6, 1941, appellant Harold M. F. Behneman filed an action in the state court alleging, in essence, that the managing officers of the corporation had been paid their full compensation, that the affairs of the corporation had not been "rehabilitated" within the meaning of that term as used in the plan of reorganization and the order of the district court, and praying that the distribution of stock to the managing officers be declared illegal and void, that they be required to surrender said stock and have it cancelled, and that the directors be called upon to account for, and be enjoined against paying, any dividends thereon.⁶¹

On January 17, 1941, appellant Gladys M. Shores filed an almost identical action in the state court.⁶² This action was duly removed to the district court,⁶³ and appellant Shores' motion to remand the same was denied.⁶⁴ Our comment upon appellants' complaint in this regard is reserved until later in this brief.

On February 19, 1941, the corporation and the other appellees filed their petition in the proceedings for the corporation's reorganization in the district court, setting forth most of the foregoing facts, and praying for an order effectuating and protecting the order of the district court confirming the plan of reorganization, and enjoining the threatened interference by the state court with said order and with the jurisdiction of the district court.⁶⁵

⁶¹Tr. p. 338.

⁶²Tr. p. 3.

⁶³Tr. pp. 1-40.

⁶⁴Tr. p. 47.

⁶⁵Tr. p. 233.

This petition was referred to Honorable Burton J. Wyman, as special master, for hearing and report.⁶⁶

On February 25, 1941, appellant Harold M. F. Behneman filed an action in the state court for supervision over the corporation's dissolution.⁶⁷

On March 5, 1941, appellants filed a motion to stay the proceedings instituted by appellees' petition in the reorganization proceedings,⁶⁸ and this motion was referred by the district court to Honorable Burton J. Wyman, as special master, for hearing and report.⁶⁹

On March 11, 1941, appellees filed a petition with the district court for an order restraining the state court actions pending the determination of the controversy;⁷⁰ and on the same day the court made its order staying said proceedings.⁷¹

On March 17, 1941, appellants filed a motion to dismiss appellees' petition and to terminate the stay of appellants' actions.⁷² This motion, together with appellees' petition and appellants' motion to stay proceedings, came on for hearing before the Honorable Burton J. Wyman, special master, on March 18, 1941.⁷³

On March 28, 1941, the special master filed his report and certificate with the district court, recommending that appellees' petitions be held properly filed and that appel-

⁶⁶Tr. p. 281.

⁶⁷Tr. p. 368.

⁶⁸Tr. p. 284.

⁶⁹Tr. p. 914.

⁷⁰Tr. p. 286.

⁷¹Tr. p. 290.

⁷²Tr. p. 336.

⁷³Tr. p. 293.

lants' motion to stay proceedings and motion to dismiss petitions and injunction be denied.⁷⁴ Appellants filed objections to the report⁷⁵ and these objections came on for hearing before the district court, at which time ruling thereon was reserved. At the same time appellants and appellees stipulated in open court that appellants' removed "Shores case" be consolidated with appellees' petitions in the reorganization proceedings.⁷⁶ Pursuant to this stipulation, the district court ordered the consolidation.⁷⁷

Accordingly, and after the filing of appropriate pleadings and interrogatories demanded by appellants, the causes so consolidated by stipulation of the parties came on for trial before the district court. That court rendered judgment in favor of appellees.⁷⁸

Nature of the Consolidated Causes Now Before the Court.

It must be remembered that the bankruptcy reorganization proceeding now before the court is a proceeding *in rem*, and that the judgment and injunction of the district court were therefore rendered in the exercise of its *in rem* jurisdiction.

Appellants claim that the "Shores action" was "brought on behalf of the Hendy Co. and all of its stockholders against the individual appellees as the directors and managing officers of said company"⁷⁹ and argue that the "Shores action" affects "only the individual appel-

⁷⁴Tr. pp. 293-371; particularly pp. 325-335.

⁷⁵Tr. p. 371.

⁷⁶Tr. pp. 916-917.

⁷⁷Tr. p. 49.

⁷⁸Tr. p. 131; Consolidated Findings and Conclusions, Tr. p. 98

⁷⁹Appellants' Brief p. 26.

lees and not the rights of either the Hendy Co. or its creditors.’’⁸⁰

This is obviously not true, for:

(1) There is no showing that the “Shores action” is representative of the desires of the other stockholders at all; on the contrary, it is clear that it is not;⁸¹

(2) The corporation is a vitally interested and necessary party. In the “Shores action” appellants sue not only the recipients of the distributions in question, but also the corporation and its directors who made such distributions. Appellants do not seek relief solely against the recipients of the distributions, but expressly attack the proceedings of the corporation and its board of directors taken pursuant to the plan of reorganization—and seek not only to have the rights of all parties under the plan of reorganization determined (and this necessarily includes creditors), but also to have the corporation’s distributions declared illegal and void, the stock issued by it cancelled, the corporation’s conduct with respect to all future dividends directed by the state court, and the corporation and its board of directors directed to account for, and be enjoined against paying, any dividends upon the stock distributed pursuant to the plan of reorganization. It clearly is incorrect to say that this is not a direct attack upon the action of the corporation and that the corporation is not vitally concerned with the nature and extent of the stock holdings in it, the reward of its

⁸⁰Appellants’ Brief p. 24.

⁸¹The largest creditor was also the second largest of the stockholders and the directors selected by and representing its interests, as well as the director selected by the stockholders, expressly voted for the distributions which appellants now attack.

management, the affairs of its creditors, the rehabilitation of its business, and whether or not it has properly executed the plan of reorganization as directed by the district court.

(3) And not only is the corporation vitally interested, but its creditors are similarly concerned. By the plan of reorganization the creditors scaled down their claims \$76,401.00 and scaled down their interest rate upon the balance of their claims, so that their total contribution to the corporation amounted to approximately \$100,000.00. This was done upon the condition, among others, that the stockholders contribute and give up 50% of their stock ownership. If appellants were successful in their "Shores action" they would completely nullify the plan of reorganization and this surrender of 50% of their ownership, and would, by cancellation of the stock issued to management, again own 100% of the outstanding stock of the corporation. The creditors are vitally concerned by such a maneuver, since, were it successful, the plan of reorganization would be so nullified that the creditors, with paramount rights, would be squeezed out of approximately \$100,000.00, whereas the stockholders, wholly junior and subordinate, would have given up and lost nothing.

It is ridiculous to claim that the corporation and all parties interested in it are not vitally concerned in the "Shores action" and its attack upon the proceedings taken by the corporation pursuant to the plan of reorganization and the order of the district court.

ARGUMENT.

I.

THE DISTRICT COURT HAD JURISDICTION OVER THE SUBJECT MATTER OF THE CONSOLIDATED PROCEEDINGS.⁸²

A. ANALYSIS OF APPELLANTS' ARGUMENT.

It is clear that there is complete factual identity between the subject matter (propriety of the distributions to the managing officers) of appellees' petitions in the district court and appellants' declaratory relief actions in the state court.⁸³ Indeed, we find nothing to the contrary in appellants' brief.

On the legal side, appellants' argument appears to shuttle back and forth between three main propositions: (1) The state court had **exclusive** jurisdiction of the subject matter; (2) The state court had at least **concurrent** jurisdiction of the subject matter; and (3) The federal court had **no** jurisdiction of the subject matter. Let us analyze each of these.

⁸²Appellants' Brief pp. 23-37.

⁸³Appellants argue (Appellants' Brief pp. 33-35) that the state court action brought under the provisions of Section 403 of the California Civil Code is distinguishable factually from the so-called declaratory relief actions and "can have no possible connection with the Hendy reorganization proceeding" (p. 35); and that the District Court erred in finding to the contrary, and was "without jurisdiction" (p. 35) to enjoin prosecution thereof.

Granting appellants' premise arguendo, the conclusion that any **jurisdictional** question is involved does not follow. And since appellants have not assigned or specified this portion of the injunctive relief granted as error except on jurisdictional grounds, we shall not consider it further. (See Appellants' Brief pp. 63-69; and Specifications of Error VII, VIII, pp. 20-21; where the contention is made that the injunctive relief granted goes beyond the scope of the issues, but no claim of error is made by appellants in regard to the enjoining of the aforesaid action.)

(1) Did the state court have exclusive jurisdiction?

Appellants do not seriously argue that any jurisdiction of the state court over the subject matter here involved was exclusive, except as that proposition might follow from the alleged lack of jurisdiction in the federal court. Appellants, without citation of authority, merely say (p. 27):

“Jurisdiction over the parties to, and the subject matter of, these actions had already attached in the State Court at the time when their further prosecution was enjoined by said District Court. It is appellants’ contention that * * * the State Court * * * had original and **exclusive** jurisdiction thereof.”

The argument appears to be based upon the well-established rule that, where a state and federal court have concurrent jurisdiction over the same parties and the same subject matter, the tribunal where it first attaches retains it exclusively.⁸⁴

⁸⁴The rule and reason therefor are expressed in *In re Cohen* (1926), 198 Cal. 221, 244 Pac. 359, where the court quotes from *Ponzi v. Fessenden* (1922) 258 U. S. 254, as follows (198 Cal. 221, 226-227):

“‘We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflict unless rules were adopted by them to avoid it

“‘The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to **exhaust its remedy**, to attain which it assumed control, before the other court shall attempt to take it for its purpose . . .’”

See also:

Sutton v. English (1918) 246 U. S. 199;

Randall v. Howard (1862) 67 U. S. 585, 589;

Morrow v. Superior Court (1936) 9 Cal. App. (2d) 16, 22, 48 P.(2d) 188, 191;

7 Cal. Jur., sec. 14, p. 691;

21 C.J.S., sec. 529, p. 808.

But appellants have overlooked the fact that application of this principle to the case at bar compels the conclusion that jurisdiction was in the district court and **not** in the state court. The controlling factor is: which court first took the subject matter of the litigation into its control? And here it unquestionably was the district court which first took jurisdiction in the reorganization proceedings.

(2) Did the state court have at least concurrent jurisdiction with the federal court?

Appellants argue that the state court was not without jurisdiction over the subject matter of the declaratory relief actions, because:

(a) The plan of reorganization was “merely a contract between the debtor corporation, its creditors and stockholders” (p. 28); and “it certainly cannot be said that a State Court is without power to construe and interpret that contract” (p. 29);

(b) In any event, the order of confirmation is a judgment; a judgment creates a contract between the parties, so “an action on a judgment is an action on a contract;” and since “the interpretation and construction of contracts is within the province of a state court,” the same must be true as to the interpretation and construction of judgments (p. 30).

These propositions are not determinative of the jurisdictional issue raised on this appeal. It is immaterial whether the state court had a sufficient jurisdiction to have enabled it to proceed with the declaratory relief actions had the district court not enjoined their prosecution. Appellants must establish, not merely that the

state court had jurisdiction, but that the district court did **not** have jurisdiction. To argue, as appellants do, that the state court might or must have had **concurrent** jurisdiction is to argue irrelevantly.

It is for this reason, too, that appellants' "case in point"⁸⁵ is completely beside the point. The case relied upon merely holds that where the subject matter of an action is within the jurisdiction of a particular court, that court is not ousted of its jurisdiction merely because the controversy may require it to construe a final instrument or document which was the result of action by another governmental tribunal or body. The facts of that case are in no way analogous to those involved here. But even if it were true, as appellants say (p. 32), that the "reasoning" of the cited decision "is applicable" here, this would go no farther than to support the proposition that the state court was not without jurisdiction—a proposition which appellees do not feel called upon to controvert, and which cannot assist appellants.

We must point out, however, that appellants' entire argument under this head is predicated upon a misconception of the nature of reorganization proceedings. The plan of reorganization under Section 77B of the Bankruptcy Act is not, as stated by appellants (p. 28), **merely** a contract between the debtor corporation, its creditors and stockholders. The plan is a proposal which must meet with requirements set forth in the statute and it is for the federal court to determine whether or not these requirements are met. If they are not met, as stated by Gerdes in the quotation appearing on page 28 of appel-

⁸⁵*Henderson v. Oroville-Wyandotte Irrigation Dist.* (1929), 207 Cal. 215, 277 Pac. 487, cited in appellants' brief (pp. 31-32).

lants' brief, the court must dismiss the proceedings or direct that the debtor be liquidated.⁸⁶

In *Case v. Los Angeles Lumber Co.* (1939) 308 U. S. 106, the supreme court referred to the all-inclusive jurisdiction of the court in reorganization proceedings and expressly held that an agreement as to the terms of a plan by the requisite majority of all parties in interest does not create a contract binding upon the court (308 U.S. at pp. 114, 125, 128-129):

“At the outset it should be stated that where a plan is not fair and equitable as a matter of law it cannot be approved by the court even though the percentage of the various classes of security holders required by § 77B(f) for confirmation of the plan has consented.

* * * * *

A debtor as well as a creditor who invokes the aid of the federal courts in reorganization or rehabilitation under § 77B assumes all of the consequences which flow from that jurisdiction. Once the property is in the hands of the court private rights as respect that *res* are subject to the superior dominion of the court and are to be adjudicated pursuant to the standards prescribed by the Congress. As a result of such proceedings the hand of all executions or levies may be stayed. **The court acquires ‘exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section.’**

* * * * *

Thus respondent argues that since the plan of reorganization was entered into between the bond-

⁸⁶Sec:

Gerdes on Corporate Reorganizations, Sec. 1036, pp. 1664-1665;

Remington on Bankruptcy, Vol. 10, Sec. 4608, p. 468; Sec. 4386, pp. 270-271.

holders and the stockholders before institution of the reorganization proceedings under § 77B, the consideration flowing from the stockholders had been furnished and the interests of the bondholders and stockholders in the assets of the debtor had been fixed prior to the filing of the petition. **In fact, respondent frankly insists that the stockholders' 'right of participation was secured by contract before, and as a condition precedent to, the institution of the 77B proceedings.'**

But the mere statement of this proposition is its own refutation. If the reorganization court were bound by such conventions of the parties, it would be effectively ousted of important duties which the **Act places on it**. Federal courts acting under § 77B would be required to place their imprimatur on plans of reorganization which disposed of the assets of a company not in accord with the standards of 'fair and equitable' but in compliance with agreements which the required percentages of security holders had previously made. Such procedure would deprive scattered and unorganized security holders of the protection which the Congress had provided them under § 77B. The scope of the duties and powers of the Court would be delimited by the bargain which reorganizers had been able to make with security holders before they asked the intercession of the court in effectuating their plan. Minorities would have their fate decided not by the court in application of the law of the land as prescribed in § 77B, but by the forces utilized by reorganizers in prescribing the conditions precedent on which the benefits of the statute could be obtained."

(3) Did the district court have jurisdiction?

a. Appellants argue that they "merely seek a determination of property rights arising out of the Plan"

(p. 28); and that the rights of the debtor and its creditors were not "affected" (p. 24).

At the same time, appellants concede (p. 28) that they attack and "question the right" of the debtor's directors "to distribute the Hendy stock in controversy" under the plan of reorganization. Appellants concede further (p. 33) that the federal court does have jurisdiction in cases where "an attempt was made to specifically do some act or thing which the court had previously decreed should not be done." But is not this precisely the case here? The question is: Did or did not the directors attempt to do an act (namely, make distributions to the management) which the district court had previously decreed should not be done, except under the circumstances specified in the decree? Hence by appellants' own test, the contention that this is a strictly private controversy is shown to be without merit.

Moreover, appellants are compelled to admit⁸⁸ that the gist of the controversy is the interpretation of the plan of reorganization itself. We shall point out presently that under the authorities such a controversy is within the jurisdiction of the district court wherein the

⁸⁸Appellants say (p. 26) that the plan of reorganization "does not define what is meant by the term 'successful rehabilitation' ". "In the absence of a definition of this term in the Plan, **it becomes necessary to consider what all of the parties thereto, that is to say, the Hendy stockholders and creditors, intended it to mean when the plan was approved by them and confirmed by the district court.**"

Appellants say (p. 27) that the subject matter of these actions includes a determination of whether successful rehabilitation was accomplished "within the meaning of that term as used in the Hendy Plan"; and that "through these actions appellants question the interpretation" placed on the plan by the Hendy directors while the latter were proceeding to act under the plan.

plan of reorganization was formulated and whereby it was approved and confirmed.

To argue that no one is interested in or affected by this controversy except the management and the stockholders is to ignore the fact that appellants are really seeking to vitiate the plan of reorganization by squeezing some \$100,000 out of the Hendy creditors, and profiting at the same time at the expense of those creditors and of the reorganization management by whose efforts alone appellants' equity as stockholders came into being.⁸⁹ It also ignores the fact that the purpose of reorganization proceedings is to promote a better realization of claims of creditors than would occur through immediate liquidation, with due regard to the superiority of such claims over the rights of stockholders.

In *In re Central Funding Corporation* (2nd C. C. A., 1935), 75 F. (2d) 256, Circuit Judge Augustus N. Hand said (p. 259):

“A ‘reorganization’ does not necessarily presuppose the survival of the rights of stockholders or even of junior creditors, when they have become worthless, but may be a readjustment of the rights of lienors under a new corporate structure. * * *

* * * * * *

Thus a plan of reorganization may or may not provide for an issuance of new securities to stockholders. The plan here does not recognize an equity which is of no value, and it arranges simply for the carrying on of the same business * * * for a long enough period to enable the new corporation

⁸⁹For a further discussion of this aspect, see our discussion of the nature of the consolidated causes before the court, *supra* pp. 24-26, and of the merits of the judgment, *infra* pp. 58-73.

to liquidate advantageously the collateral that secured the bonds that were issued by the debtor.”⁹⁰

The Supreme Court of the United States, as well as this Circuit Court of Appeals, has expressed in several decisions the fundamental principle that the interest of stockholders in the reorganized corporation is subordinate to the interest of creditors.⁹¹

b. Appellants argue that the district court was without jurisdiction because determination of the factual aspects of the controversy revolves about occurrences which took place *after* entry of the final decree (pp. 26-27),⁹² and the decree contained no “reservation of jurisdiction” (pp. 36-37). We shall now point out that under the authorities these considerations are not controlling or even persuasive.

B. THE DISTRICT COURT HAD CONTINUING OR SUPPLEMENTAL JURISDICTION FOR THE PURPOSE OF ENFORCING OR EFFECTUATING THE FINAL DECREE CONFIRMING THE PLAN OF REORGANIZATION.

(1) The district court had ancillary jurisdiction to enforce its decree in the reorganization proceeding.

The basis of ancillary jurisdiction is well stated in

Venner v. Pennsylvania Steel Co. (D. N. J. 1918)
250 Fed. 292, 296-297:

⁹⁰See also:

Remington on Bankruptcy, Vol. 10, sec. 4386, p. 272.

⁹¹*Case v. Los Angeles Lumber Co.* (1939), 308 U.S. 106, 116, 120, 121-2, 126;

Securities and Exchange Commission v. U. S. Realty & Improvement Co. (1940), 310 U.S. 434, 452;

In re Consolidated Rock Products Co. (9th C.C.A., 1940), 114 F. (2d) 102, 106-117 (affirmed, 312 U.S. 510, 527).

⁹²No authority is cited by appellants in support of this novel idea. It hardly needs to be said that ancillary proceedings frequently involve occurrences taking place after the entry of the original and otherwise final judgment.

“Is the supplemental bill ancillary in its character? A generalization of the cases * * * seemingly justifies the following, not as a precise classification, but an illustration of what constitutes ancillary jurisdiction in a federal court. It is a supplemental proceeding (a) to protect from interference with, and to determine, conflicting claims to assets, within its administrative control, and (b) to control and regulate suits brought before it and to restrain or enforce its judgments, or to further deal with the subject-matter thereof. Any proceeding having one or the other of these objects in view intervening in an existing action, whether by bill, petition, or motion, is dependent on the original suit, and the federal courts have cognizance thereof independent of any distinct ground of federal jurisdiction. Such jurisdiction may be invoked by a stranger to the original suit, and will not fail because new parties are brought in * * * ’93

⁹³Independent jurisdictional grounds are not required in ancillary proceedings.

Local Loan Co. v. Hunt (1934), 292 U.S. 234;

Campbell v. Golden Cycle Min. Co. (8th C.C.A. 1905), 141 Fed. 610;

1 Moore’s Federal Practice, p. 466;

20 C.J.S. sec. 11, p. 330;

Gerdes on Corporate Reorganizations, sec. 1147, p. 1828.

In the *Campbell* case above cited Circuit Judge Sanborn said (p. 612) :

“The suit in hand cannot stand as an original suit, because no federal question is involved in it and the requisite diversity of citizenship does not exist. But a suit in equity, dependent upon a former suit of which the federal court has jurisdiction, may be maintained in the absence of a federal question and of diversity of citizenship (1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; or (3) to enforce or obtain an adjudication of liens upon, or claims to, property in the custody of the court in the original suit. Such a suit is but the continuation in a court of equity of the original suit, to the end that more complete justice may be accomplished thereby.”

From this and numerous like authorities it is clear, we submit, that the district court had ancillary jurisdiction to enforce its decree in the reorganization proceeding. And in this connection it should be emphasized that ancillary jurisdiction is exclusive, where the court's jurisdiction over the subject matter of the original proceedings was exclusive.⁹⁴

(2) The district court sitting as a court of bankruptcy had jurisdiction to enforce its decree in the exercise of the plenary powers of a court of equity.

The determination of the extent of jurisdiction of the bankruptcy court involves a consideration of the powers of such a court. Section 77B (a) of the National Bankruptcy Act⁹⁵ provides in part:

“If the petition or answer is so approved, an order of adjudication in bankruptcy shall not be entered and the court in which such order approving the petition or answer is entered shall, during the pendency of the proceedings under this section, have exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section, and shall have and may exercise all the powers, not inconsistent with this section, which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature.”⁹⁶

The authorities are uniform to the effect that in exercising jurisdiction under the aforementioned section of the Bankruptcy Act, bankruptcy courts sit as courts

⁹⁴21 C.J.S. sec. 88, p. 138.

⁹⁵11 U.S.C.A. sec. 207(a).

⁹⁶Substantially the same language is found in the new Chapter X of the Bankruptcy Act—see 11 U.S.C.A. sec. 515.

of equity, and are governed by equitable principles, including the inherent power to protect their decrees by injunction or otherwise.⁹⁷

The powers of a district court over a debtor in a reorganization proceeding are clearly stated in Gerdes on Corporate Reorganizations as follows (Vol. 1, sec. 459, pp. 698-700):

“The federal district court, sitting as a court of bankruptcy, has original jurisdiction in all proceedings brought under Section 77B of the Bankruptcy Act. In such proceedings, the court has greater powers than those usually exercised in bankruptcy. * * *

Every court of bankruptcy is also a court of equity, and the very purpose of the Bankruptcy Act is to establish and grant equity. If a bankruptcy court obtains jurisdiction of the person or of the subject matter, it may exercise the plenary powers of a court of equity for the ascertainment and enforcement of the rights and equities of the various parties. * * *

In proceedings under Section 77B, therefore, the court has the following powers, derived from three sources: (1) the powers which a federal court has in an equity receivership, except such as are inconsistent with Section 77B; (2) the powers of a court in bankruptcy proceedings, except such as are inconsistent with the provisions of Section 77B; and (3) the powers given by Section 77B itself.’’⁹⁸

⁹⁷*Prudence Corp. v. Geist* (1942) 316 U.S. 89, 95;
Securities Comm'n v. U. S. Realty Co. (1939) 310 U.S. 434, 455, 457;
Pepper v. Litton (1939) 308 U.S. 303-304;
Clinton v. Shoop (8th C.C.A., 1941) 118 F. (2d) 811, 814;
In Re Charles Nelson Co. (N.D. Cal., 1939) 25 F. Supp. 56, 57.
⁹⁸See also: Remington on Bankruptcy, Vol. 10, sec. 4402, p. 294.

Appellants contend that the final decree in the Hendy reorganization proceeding was “without any reservation of jurisdiction,” and that, as a result, “the District Court lost all power to later entertain jurisdiction over injunction proceedings of the character instituted by appellees’ petitions of February 19 and March 11, 1941.”⁹⁹

Contrary to this contention, we submit that the decree expressly reserves jurisdiction to deal with the identical matters here involved. (See the discussion of the form of decree at p. 45 *infra*.) But even if it were assumed that the decree did not expressly reserve jurisdiction, still, under settled principles governing the jurisdiction of the reorganization court, that court had continuing or supplemental jurisdiction over the proceedings instituted by appellees’ petitions of February 19 and March 11, 1941. Many of the cases establishing this proposition are cited in Gerdes on Corporate Reorganizations in support of the following statement (Vol. 3, sec. 1147, p. 1828):

“Although Section 77B states that the entry of the final decree closes the case, it is probable that the court will retain jurisdiction over all supplemental litigation which may arise out of the original proceeding. In equity receivership proceedings, the court may entertain such supplemental suits whether or not the ordinary jurisdictional requirements exist. In other words, such suits are subject to the court’s jurisdiction whether or not there is diversity of citizenship, more than three thousand dollars in controversy, or a dispute involving federal questions.”

Among the pertinent cases cited is *Minnesota Co. v. St. Paul Co.* (1864) 69 U.S. 609, where the court said (p. 632):

⁹⁹Appellants’ Brief, pp. 36-37.

“The present suit grows immediately out of and is a necessity which arises from the suit, by Bronson, Soutter, and Knapp, to foreclose the Land Grant mortgage; under the decree in which suit the Western Division of the La Crosse and Milwaukie Road was sold, and also all the rolling stock of the company belonging to both divisions, to the Milwaukie and St. Paul Railway Company. The present suit is really a continuation of that one. The rights of the parties depend upon the construction which is placed upon the acts of the court in it; and the present bill is necessary in order to have a declaration of what was intended by the orders and decrees made in that suit, and to enforce the rights which were established by it.”¹⁰⁰

A case presenting facts closely analogous to the instant case is *In Re Hermitage Bldg. Corporation* (7th C.C.A., 1938), 100 F. (2d) 597. In that case the debtor filed a petition for reorganization on September 18, 1934, and filed its proposed plan on December 12, 1934. The plan was confirmed on February 25, 1935. The plan included the following provision (p. 598):

“The common stock was to be held in the treasury of the corporation, and delivered to the holders of the old common stock at any time within five years from the effective date for the creation of the preferred stock, provided all the preferred stock should have been retired or redeemed.”

¹⁰⁰See also:

Cincinnati, etc. R.R. v. Indianapolis, etc. Ry. (1926) 270 U.S. 107, 114-117;

Riverdale Mills v. Manufacturing Co. (1904) 198 U.S. 188, 195;

Lang v. Choctaw, Oklahoma & Gulf R. Co. (8th C.C.A., 1908) 160 Fed. 355, 360;

Campbell v. Golden Cycle Min. Co. (8th C.C.A., 1905) 141 Fed. 610, 613;

St. Louis-San Francisco Ry. Co. v. M'Elvain (E.D. Mo., 1918) 253 Fed. 123, 128.

A final decree was entered on June 4, 1937, by the terms of which the plan was declared to have been carried out, the reorganization proceedings closed and terminated, and the debtor and its assets were released from the jurisdiction of the court. Thereafter, on January 11, 1938, appellant filed a stockholders' bill in an Illinois state court against directors of the debtor to compel the issuance of new common stock in accordance with the provisions of the reorganization plan, and for the restitution to the debtor of dividends alleged to have been illegally declared and paid in violation thereof. The state court directed appellant to present the matter of jurisdiction to the district court, which held that it had jurisdiction. In affirming the holding of that court the Circuit Court of Appeals said (pp. 599, 600):

“It is first contended by appellant that the District Court was without jurisdiction to enter the injunction of March 30, 1938. There is no merit in this contention. Section 2(15) of the Bankruptcy Act, 11 U.S.C.A. § 11(15), authorizes the court to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of the Act. While this provision has been construed to authorize the injunctive power of the court only where the one enjoined is interfering with property which is in the actual or constructive possession of the bankruptcy court, yet this limitation does not prevent that court from protecting and enforcing its own decrees, nor does it authorize a state court to review and alter the terms of the bankruptcy decree. * * * We think there can be no doubt that that court had jurisdiction of the subject matter, notwithstanding the fact that the final decree had dismissed the debtor and stated

that the plan had been carried out. * * * The plan was agreed upon and the reorganization of the debtor was perfected, but it was not completely executed, so as to determine the identity of the stockholders and their interests, nor could it be until it was determined whether the preferred stock would be redeemed or retired within five years. **Until that fact should be determined the bankruptcy court, under the facts here presented, had jurisdiction of the subject matter to protect and enforce its decree (cases cited) * * *.**

Furthermore, appellant's petition informs us that the plan was not carried out because, as he alleges, the new common stock was not issued by the debtor, and tendered to appellant for his endorsement in blank, as contemplated by the plan. If this be true, **it is obvious that the District Court had jurisdiction to see that the plan was complied with.'**

To the same effect see:

In Re 431 Oakdale Avenue Bldg. Corporation (N.D. Ill., 1939) 28 F. Supp. 63;

Hesselberg v. Aetna Life Ins. Co. (8th C.C.A., 1939) 102 F. (2d) 23, 27.

An additional ground upon which the bankruptcy court had jurisdiction over appellees' petitions of February 19 and March 11, 1941, is found in paragraph 15 of the final decree of January 27, 1937, which provides (Tr. p. 231):

"That all creditors of, claimants against, and stockholders of the debtor affected by said plan of reorganization, wheresoever situated or domiciled, be, and they are hereby, restrained and enjoined from pursuing or attempting to pursue or commencing any suits or other proceedings at law or in equity or

otherwise against debtor and/or said trustee, or any of the assets or properties of the debtor, directly or indirectly, on account of or based upon any right, claim, or interest which any such creditor, claimant, or stockholder may have had in, to, or against the debtor.”

The temporary restraining order (Tr. pp. 290-293) and injunction (Tr. pp. 131-136) of the district court in the case at bar merely carry out the provisions of paragraph 15 of the original decree quoted above. Appellants violated paragraph 15 by commencing the actions in the state court and it was not only proper but necessary that the district court exercise its jurisdiction to enforce its decree.

See,

Holmes v. Rowe (9th C.C.A., 1938) 97 F. (2d) 537;

Local Loan Co. v. Hunt (1934) 292 U.S. 234;

In Re Hermitage Bldg. Corporation (7th C.C.A., 1938) 100 F. (2d) 597, quoted *supra*, pp. 40-42;

Cornue v. Ingersall (1st C.C.A. 1910) 176 Fed. 194.

In the *Holmes* case Circuit Judge Garrecht said (p. 539):

“A review of the decisions discloses that a Federal District Court, once having obtained jurisdiction of a controversy, and having rendered a decision in the matter, has complete power to protect the judgment or decree which it has rendered, and may go so far as to enjoin an action entertained in the state court by a litigant, involving the same subject-matter, when such action may in any way interfere with, or nullify the effect of said judicial determination. So here, the Court having discharged the appellee in bankruptcy, still retained sufficient jurisdiction to grant an injunc-

tion restraining appellant from levying execution upon a judgment rendered in his favor by the state court against the appellee upon a claim adjudicated in the bankruptcy court.”¹⁰¹

In the *Local Loan* case, the Supreme Court said (292 U.S. 239):

“That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. [Cases cited.] And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one.”

¹⁰¹This case was particularly relied upon by the special master. In his opinion he said (Tr. pp. 326-327):

“I. There is one proposition as to which I am absolutely certain, and that is that this court, inasmuch as ‘the duties of the debtor and the rights and liabilities of creditors, *and of all persons with respect to the debtor and its property*, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor’s petition or answer was approved,’ has the jurisdictional power to deal with the matters referred to in the two petitions now before the court for consideration.

See *Holmes v. Rowe*, (C.C.A. 9) 97 F. (2d) 237.

In other words, it is my unqualified opinion that no successful contention can be made that this court by entering the final decree in the debtor proceeding here under consideration deprived itself of the right to defend said final decree, to say what it meant, or of the right to deny to any other court, except a Federal Appellate Court, the possibility of making a finding and decree which might put a different interpretation upon said final decree of this court from what would be found and decreed in said last mentioned court. In the language of *In re Home Discount Co.*, 147 F. 552, ‘The law does not make * * * weaklings of courts of bankruptcy. They have ample power to protect the bankrupt in the enjoyment of all his rights, and to frustrate the efforts of those who seek to defeat the practical enjoyment of them.’ ”

- (3) **The district court had jurisdiction by virtue of the reservation of jurisdiction in the final decree confirming the plan of reorganization.**

From the foregoing it appears that the district court would have jurisdiction of the instant proceedings even if appellants were correct in their contention that the "Final Decree" entered on January 27, 1937, did not reserve jurisdiction. However, contrary to appellants' contention, that decree expressly reserved jurisdiction to deal with the identical matters now before the court. It provided in part (Tr., pp. 231-232):

"That the proceedings for the corporate reorganization of the debtor in this court entitled 'In the matter of The Joshua Hendy Iron Works, a corporation, debtor, No. 25937-S', be, and the same hereby are, terminated and closed; such termination and closing to be for all purposes final upon the filing herein of receipts showing the payment of the final fees and expenses hereinabove allowed, and the surrender and exchange of the stock certificates which have not yet been surrendered and exchanged as provided in said plan of reorganization."

The order confirming the plan of reorganization and directing the reorganization of the debtor corporation also expressly reserves jurisdiction in the following language in paragraph 29 thereof (Tr., pp. 221-222):

"That all matters not determined by this order are reserved by this court for future determination. That the life of this order shall be for and during such term as may be necessary to fully consummate the provisions of the aforesaid plan of reorganization. That this court further reserves the right and retains exclusive power and jurisdiction, by appropriate order or orders hereafter entered, to provide for and carry

out said plan of reorganization under and subject to the supervision and control of this court, and hereby retains and shall have exclusive jurisdiction of the debtor and its property, wherever located, and shall have and may exercise all powers granted to it by law. * * *

Section 6 (G) of the plan of reorganization (Tr., pp. 186-187), confirmed by the above mentioned order, requires the stockholders to endorse and deliver over the stock held by them to the board of directors of the debtor corporation, to be held by the board as follows: (1) 50% in trust for at least five years. Upon the expiration of this period and upon the payment in full of the extended obligations, these shares are to be returned to their respective owners. (2) The remaining 50% of the shares to be held by the board and to be distributed by the board in its sole discretion to the managing officers thereof as a reward for management and the successful rehabilitation of the company's affairs.

It is clear from the foregoing that the court intended and provided that the administration of the proceeding should not be closed until the surrender and exchange of the stock certificates in accordance with the confirmed plan of reorganization. The fact that on January 27, 1937, the court recited in its decree that the proceedings were at an end did not necessarily conclude the administration of the estate.¹⁰² The provisions in the final decree for the surrender and exchange of the stock certificates constitute a clear reservation of jurisdiction for the pur-

¹⁰²See, *In Re Paramount Publix Corporation* (2d C.C.A., 1936), 82 F. (2d) 230.

pose of effectuating the entire plan of reorganization. A part of this entire plan was the exchange of stock, which was accomplished long after the entry of the decree. That decree says that the surrender and exchange shall be made "as provided in said plan of reorganization." Until both the surrender and exchange is accomplished as set forth in the plan of reorganization, the district court retains jurisdiction. If this were not true, the above quoted language in the final decree would be meaningless.

Appellants' principal argument does not make against the jurisdiction of the district court, but on the contrary sustains this jurisdiction. Fundamentally, they argue that the stock has not been distributed in accordance with the plan of reorganization, and that the distribution of 50% of the stock to appellees Bassick, Hyland and Levit was unlawful. We contend and hereafter show (*infra*, pp. 58 to 73) that these arguments are without merit. But this aside, it is clear that if, as appellants contend, there has not been a distribution of the stock in accordance with the plan of reorganization, it must follow that the federal court has jurisdiction under the express reservation of jurisdiction in the decree until the stock is **"surrendered and exchanged as provided in the plan of reorganization."** In other words, it necessarily follows, as practicably it should follow, that any attack upon the plan of reorganization or the manner in which it was carried out necessarily raises a controversy within the jurisdiction of the district court.

II.

REPLY TO APPELLANTS' CONTENTION THAT THE INDIVIDUAL APPELLEES ARE NOT PROPER PARTIES TO THE REORGANIZATION PROCEEDINGS.

Appellants say that the judgment should be reversed because (p. 41) "the individual appellees could not become proper parties to the Hendy reorganization proceeding by the mere act of filing their petitions" without following the intervention procedure outlined in Rule 24 of the Federal Rules of Civil Procedure.

This argument obviously relates to a mere technicality and does not affect the substantial rights of the parties. Nowhere do appellants suggest that, had a formal motion for permission to intervene been made, it would have been, or properly could have been, denied; nowhere do they suggest that they suffered any prejudice because of appellees' failure to file a formal motion in intervention.¹⁰³

Appellees' original petition¹⁰⁴ fully stated the grounds and the facts upon which appellees sought relief. As to substance, therefore, it complied with the requirements specified for motion and pleading in intervention by Rule 24(c). The petition was referred to the special master with power to hear and determine all matters in con-

¹⁰³28 U.S.C.A., sec. 391:

"On the hearing of any appeal * * * in any case * * * the court shall give judgment * * * without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

¹⁰⁴Tr. p. 233.

nection therewith.¹⁰⁵ As pointed out in appellants' brief, appellants appeared before the special master and specifically urged the point they now make (that appellees failed to file a formal motion for intervention). Subsequently they "again raised the same point * * * in the District Court" (Appellants' Brief, p. 41). It is clear, therefore, that the question of whether or not appellees had a right to intervene was directly presented and passed upon. Appellants say (p. 41) that the special master and the district court "ignored" their contention. On the contrary, we submit, the action of the special master and the district court is consistent with the granting of permission to intervene.¹⁰⁶

Appellants argue that under the provisions of subdivision (c) (11) of Section 77B, appellees' right to intervene was merely permissive (p. 38, et seq.). It has been pointed out, however, that this section "can hardly be considered a restriction upon the ordinary rules of intervention."¹⁰⁷

¹⁰⁵The order of the district court referred the petition to the special master "with full and complete powers to hear said petition and all other matters in connection therewith, and to determine any and all questions and matters therein involved and herein, and to make appropriate orders and to do all things necessary or proper with reference to said petition and such questions and matters" (Tr. p. 281). The order fixed a time for hearing, and prescribed notice to appellants by service upon their attorneys (see Fed. Rules Civ. Proc., Rule 5 (b)). Such service was made and acknowledged (Tr. p. 284).

¹⁰⁶"Overruling a motion to strike out a petition of intervention filed without leave of court has been held equivalent to granting leave, and to relate back to the date of the filing of such petition" (47 C.J. sec. 454, 233).

"As a general rule, leave to intervene is given by an order. Nevertheless, such leave may be implied" (10 Remington on Bankruptcy 546).

See, also, 39 Am. Jur. 946, n. 19.

¹⁰⁷*Seaboard Terminals Corp. v. Western Maryland Ry. Co.* (4th C.C.A., 1940) 108 F. (2d) 911, 914.

And an interest based on property in the control of a court has traditionally been held to give an absolute right to intervene by analogy to the ancient equitable practice of examination *pro interesse suo*.¹⁰⁸

In *Missouri-Kansas Pipe Line Co. v. United States* (1941), 312 U.S. 502, a suit in equity brought by the government to enforce the anti-trust laws, it was charged that the defendants had conspired to monopolize natural gas operations so as to shut out competition by the Panhandle Company. A consent decree was entered which sought to assure opportunities for competition by Panhandle. Panhandle attempted to intervene, but was denied permission. The supreme court pointed out that Panhandle's rights were safeguarded by explicit provisions in the decree—just as in the case at bar, the decree expressly recognized the interests of the management in the stock—and held that under these circumstances Panhandle unquestionably had standing to present its contentions to the trial court. In this connection, the court said (312 U.S. 508):

“* * * the codification of general doctrines of intervention contained in Rule 24 (a) does not touch our problem. And since the protection afforded Panhandle by * * * the decree could only be secured by * * * active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable.”

Appellants suggest (p. 38) that formal intervention procedure was essential “in order to give the District

¹⁰⁸Moore and Levi, *Federal Intervention*, 45 Yale Law Journal; Finletter, *Bankruptcy Reorganization*, pp. 594-599.

Finletter points out that the right to intervene may be absolute in reorganization proceedings, despite the apparently discretionary wording of the statute. He applies this to petitioners *pro interesse suo*, and particularly as to proceedings in rem.

Court jurisdiction of their petitions.” This is unsound; no jurisdictional problem is presented here.

Levi and Moore, Federal Intervention, 47 Yale Law Journal 898, 927:

“* * * a rule which is in accordance with most of the cases * * * is that intervention under an absolute right or under a discretionary right in an *in rem* proceeding, need not be supported by grounds of jurisdiction independent of those supporting the original action. * * * the rule is in accordance with the general theory that in such situations intervention is ancillary to the main proceeding.”

In addition to the foregoing, appellants’ argument is wanting in substance for a further reason. Section 77B provides that “The debtor shall have the right to be heard on all questions.” Appellants concede (p. 39) that the “right to be heard” is not “conditioned upon intervention.”¹⁰⁹ Since the debtor was a party to the petitions filed here, the propriety of the procedure followed cannot be questioned. We have pointed out elsewhere the error of appellants’ contention that the debtor was not an interested party to these proceedings (*supra*, pp. 24-26). But whether interested or not, it had a statutory right to be heard, and hence to file the petitions. The same

¹⁰⁹There is a distinction between the “right to be heard” and “intervention.”

Public Service Commission v. Philadelphia Rapid T. Co. (3d C.C.A., 1935) 82 F.(2d) 481;

Finletter, *Bankruptcy Reorganization*, pp. 592-3.

Indeed, that the right to be heard is not conditioned upon filing a petition for leave to intervene is entirely clear from the language of section 77B itself.

See also:

Rogers v. Consol. Rock Products Co. (9th C.C.A., 1940) 114 F.(2d) 108, 110.

reasoning applies to those petitioners who were directors of the debtor corporation.

Beyond this, all of the appellees—including those who appellants argue did not become parties to the reorganization proceedings—were joined as defendants in the Shores action which involves identical points and which, after removal to the federal court, was by stipulation of the parties consolidated with the reorganization proceedings (see p. 24, *supra*). A single judgment determining the rights of all parties was entered in the consolidated cause (Tr. pp. 131-136). Obviously, therefore, appellants' argument can not affect the substantial rights of the parties.

Finally, while formal intervention procedure as prescribed by Rule 24 might have been availed of by appellees, it was not essential. Ancillary jurisdiction may be invoked by bill or petition, as well as by motion.¹¹⁰

The original proceeding herein was one *in rem* under Section 77B. Appellees and petitioners were (a) the debtor; (b) the directors of the debtor who were charged by the plan of reorganization and final decree with certain duties as trustees in carrying out the plan of reorganization, some of which duties comprise the subject matter of the petitions; and (c) the managing officers of the debtor, whose interests in the stock distributed were provided for in the plan and in the decree of the court. All of these parties clearly had an interest sufficient to invoke the ancillary jurisdiction of the court by bill or petition.

¹¹⁰*Venner v. Pennsylvania Steel Co.* (D. N.J., 1918) 250 Fed. 292, 297.

III.

REPLY TO APPELLANTS' CONTENTION THAT THE DISTRICT COURT WAS WITHOUT JURISDICTION OF THE SHORES ACTION.**A. THE JURISDICTION OF THE DISTRICT COURT TO ENTER THE JUDGMENT UNDER REVIEW DOES NOT DEPEND UPON THE PROPRIETY OF THE REMOVAL OF THE SHORES ACTION.**

In the succeeding subdivision of this brief we point out the reasons why the Shores action was properly removed to the district court. Here at the outset we wish to emphasize, however, that the jurisdiction of the district court does not depend upon the propriety of that removal. Since, as we have shown, the district court has jurisdiction to entertain appellees' petition in the reorganization proceedings, it had jurisdiction to render the judgment appealed from regardless of whether or not the Shores action was properly removed from the state court.¹¹¹ Hence, the validity of the judgment appealed from is not affected by the propriety of removal.

However, even if the question of removal were material, we submit that the Shores case was properly removed and that the district court correctly denied appellants' motion to remand.

B. THE SHORES ACTION WAS PROPERLY REMOVED BY THE DISTRICT COURT.

Appellants cite authorities which they contend support the absolute rule that a case arises under the laws of the United States, within the meaning of the removal statute

¹¹¹We have already pointed out the identity of subject matter between the district court petitions and the state court suits. *Supra*, p. 27.

(28 U.S.C. 71), “only when a recovery depends on the construction of such a law”, (Appellants’ Brief pp. 45-46). We submit, for reasons hereinafter stated, that the Shores action necessarily involves the construction of the Bankruptcy Act. But this aside, the test stated by appellants is contrary to the terms of the removal statute itself and to the decisions construing that statute in situations similar to that presented in the case at bar. The rule applicable to this case is stated in section 184 of the Cyclopedia of Federal Procedure, immediately following that part of the text cited by appellants (Vol. 1, p. 854):

“The plaintiff must claim and seek to vindicate in the action brought, a right or title under the Federal Constitution, laws or treaties, as distinguished from titles or rights depending on rules of the common law, or on state statutes or local laws and regulations.”

As stated by the court in *Hartford Fire Ins. Co. v. Kansas City, M. & O. Ry. Co.* (N.D. Texas, 1918), 251 Fed. 332, 333:

“It seems to me a suit arises under a law when it is brought to enforce the provisions of or liability thereby given, or is controlled as to the right of recovery by the provisions of such law.”

To the same effect see:

American Surety Co. v. Shultz (2d C.C.A., 1915),
223 Fed. 280, 281;

Leslie v. Brown (6th C.C.A., 1898), 90 Fed. 171;

Rogge v. Michael Del Balso, Inc. (S.D.N.Y., 1936),
15 F. Supp. 499, 501;

M’Goon v. Northern Pac. Ry. Co. (N.D., 1913), 204
Fed. 998.

Familiar examples of the application of the foregoing principles are to be found in the cases holding that suits brought against federal corporations which owe their existence and derive all of their powers from federal statutes are suits arising under the laws of the United States within the meaning of the removal statute.¹¹² Other examples are suits brought for damages or injuries to property while being transported in interstate commerce;¹¹³ suits to enforce the rights of an obligee against a bond taken by a federal court in conformity with a federal statute;¹¹⁴ and actions in trespass against marshals of the United States for seizing property under attachment.¹¹⁵

In the case at bar the rights asserted by the parties in the Shores action are rights arising under a law of the United States, namely, the Bankruptcy Act. The original decree of the district court in the reorganization proceedings was not a decree adjudicating ordinary rights at common law, but a decree which confirmed to the parties, including the plaintiffs in the Shores action, rights given to them by the Bankruptcy Act. The alleged rights asserted by plaintiffs in the Shores action arise **exclusively** out of the provisions of the Bankruptcy Act. In this situa-

¹¹²*Federal Bank v. Mitchell* (1928), 277 U.S. 213;
Texas & Pacific Railway Co. v. Cox (1892), 145 U.S. 593;
Texas & Pacific Railway Company v. Kirk (1885), 115 U.S. 1.

¹¹³*Great Northern Ry. v. Galbreath Co.* (1926), 271 U.S. 99;
Southern Pacific Co. v. Stewart (1917), 245 U.S. 359.

¹¹⁴*Howard v. United States* (1902), 184 U.S. 676.

¹¹⁵*Bock v. Perkins* (1891), 139 U.S. 628, followed in an opinion by District Judge Van Fleet in *Frank v. Leopold & Feron Co.* (N.D. Cal., 1909), 169 Fed. 922; see also, *Allen v. Clark* (S.D. Cal., 1938), 22 F. Supp. 898.

tion a suit brought to enforce these rights, whether they be incorporated in a decree of a federal court or not, is one arising under the laws of the United States.

In *Woods v. Root* (7th C.C.A., 1903), 123 Fed. 402, an action was brought to enjoin officers of the United States from changing the location of a highway bridge over a government canal, in alleged violation of a decree of the district court. The bill was filed in a state court in Illinois and removed to the federal court upon the ground that it was a suit arising under the laws of the United States. The court said (p. 404):

“The case was rightly removed into the United States Circuit Court. It arises out of an order made in the District Court in pursuance of an act of Congress authorizing the condemnation of the highway for the purpose of a canal. The suit is one, therefore, arising under the Constitution and laws of the United States.

* * * * *

To allow the bill under consideration to lie would be to charge the state court, or, on removal, the Circuit Court of the United States with the execution of the District Court's executory order. The two Courts might disagree as to the order's meaning, its scope, or the manner of its enforcement, and a conflict ensue such as the policy of the law forbids. Until the order is fully executed, so that it is no longer within the power of the court, but has become a fixed right of the party, no question going merely to its terms, or the manner of its enforcement, can be entertained outside the court that entered it. The Circuit Court of Whiteside County was in this respect without jurisdiction.”

See also:

First Nat. Bank v. Society for Savings (4th C.C.A., — o
1897), 80 Fed. 581, 582, 583;

*South Dakota C. Ry. Co. v. Continental & C. T. & S. — o
Bank* (8th C.C.A., 1919), 255 Fed. 941, 943.

*Torquay Corporation v. Radio Corporation of
America* (S.D.N.Y., 1932) 2 F. Supp. 841.

This court had before it an analogous situation in *Pacific Telephone & Telegraph Co. v. Agnew* (9th C.C.A., — ok
1925), 5 F.(2d) 221, where the state court had denied an application for removal in a suit involving the effect of the decree of a federal court. In its opinion this court expressed the view (5 F.(2d), at p. 223) that the state court erred in denying the petition for removal.

In addition to the foregoing we submit that the Shores action necessarily involved a construction of the Bankruptcy Act. Appellants say (Brief p. 48):

“The Shores action merely involves a determination of the property rights of the parties thereto with respect to stock of the Hendy Co. in question, which rights were established by, and rise out of, the Hendy Plan of Reorganization and decree of the District Court confirming it. * * * Such determination may incidentally involve the interpretation and construction of the Hendy Plan * * *. But neither the Constitution nor laws of the United States can afford any aid in the solution of this problem.”

This is incorrect. As heretofore pointed out, appellants seek a construction of the decree of the district court which would result in the stockholders of the reorganized corporation retaining 100% of their equity in that corpo-

ration while, at the same time, the creditors of the corporation would have given up substantial rights in their security interests and the reorganization management would not have been adequately compensated. If the decree of the court and the plan of reorganization were so interpreted, the plan clearly would be in conflict with the provisions of section 77B as construed by the Supreme Court of the United States. Therefore, it is evident that the plan of reorganization and the decree of the district court cannot be construed without considering the meaning and effect of the provisions of the Bankruptcy Act.

IV.

THE JUDGMENT OF THE DISTRICT COURT WAS PROPER "ON ITS MERITS".

We turn now to appellants' argument upon the merits. This point was originally abandoned. It was not specified as a ground of appeal and was raised only after appellants had been required to bring up a representative record.

Appellants state that:

"Whether this stock distribution was proper is the fundamental question to be determined by this Court in deciding whether the judgment of the District Court was correct on the merits."¹²⁶

This is **not** the fundamental question. The findings of the district court are presumptively correct and "are not to be disturbed on appeal unless they are clearly errone-

¹²⁶Appellants' Brief p. 51.

ous'' (*Occidental Life Ins. Co. v. Thomas* (9th C.C.A., 1939), 107 F.(2d) 876, 878).¹²⁷

The plan of reorganization provided that the board of directors should hold the 2212½ shares of stock "free and clear of any claim, right, title, or interest therein" by the old stockholders and distribute it

"in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company's affairs."¹²⁸

After approximately five years of capable management the board of directors determined that the affairs of the corporation had been successfully managed and rehabilitated and distributed the stock to the three managing officers of the corporation chiefly responsible therefor. This was done not only pursuant to the plan of reorganization, but also pursuant to repeated assurances to the managing officers in consideration of which these officers had been working for partial compensation.

A. APPELLANTS' ATTACK IGNORES THE EFFECT WHICH MUST BE GIVEN THE WORDS "AS A REWARD FOR MANAGEMENT".

Appellants first argue that since the managing officers were to receive the stock "as a reward for management and the successful rehabilitation of the company's affairs", the word "and" must be considered to have been

¹²⁷See also:

Fed. Rules Civ. Proc., Rule 52 (a);
Cherry-Burrell Co. v. Thatcher (9th C.C.A., 1939), 107 F. (2d) 65, 69;
Bolander v. Godsil (9th C.C.A., 1940), 116 F. (2d) 437;
Luzier's, Inc. v. Nee (8th C.C.A., 1939), 106 F. (2d) 130, 135.

¹²⁸Tr. p. 187.

used conjunctively and not disjunctively. They ignore the element of "reward for management" and also the uncontroverted testimony and findings that the stock, as well as the cash, was distributed to the managing officers partly as a reward for their successful management.

Appellants contend that the board of directors was empowered to distribute this stock **only** upon the successful rehabilitation of the company's affairs. This contention fails to give any effect to the provision in the plan, that the board, **in its sole discretion**, was entitled to give the stock to the managing officers "as a reward for management" as well as for "the successful rehabilitation of the company's affairs." Assuming for the purpose of argument that there is doubt whether the corporation was successfully rehabilitated—although the evidence plainly shows its rehabilitation—the language of the plan plainly entitles the directors to distribute the stock to the managing officers "as a reward for management." To determine otherwise would be to fail to give any effect to these words in the plan.

The meaning of the word "and" depends upon the intention of the parties demonstrated by the whole instrument. In numerous cases the word "and" has been construed as disjunctive in order to accomplish this intent.¹²⁹

¹²⁹*United States v. Fisk* (1865), 3 Wall. 445, 447;
Northern Commercial Co. v. United States (9th C.C.A., 1914), 217 Fed. 33, 36;
Manson v. Dayton (8th C.C.A., 1907), 153 Fed. 258, 269;
Brown v. Grand Rapids Parlor Furniture Co. (6th C.C.A., 1893), 58 Fed. 286, 291;
H. Laughlin E. Corp. v. J. W. Leavitt & Co. (1931), 116 Cal. App. 197, 201, 2 P.(2d) 511;
Abbey v. Board of Directors (1922), 58 Cal. App. 757, 760, 209 Pac. 709.

It is clear that the intention of the parties here demands a disjunctive construction. At the outset, when the plan of reorganization was being voted upon, appellants characterized the plan as giving the board of directors the power “to give [the stock] away at any stage that they want to,”¹³⁰ and that “there is no condition upon which these people are to get this stock, at what stage of the game.”¹³¹ All of the interested parties acquiesced in this statement and it was the plain intention of all. The special master epitomized the plain intent of the plan as follows:¹³²

“The Master. Why cannot the Court approve the use of it for the purpose of procuring a competent management and paying the managers, instead of the money, paying them by delivering stock to them?”

Appellants cannot deny that the stock did “reward management,” and this is a complete answer to the contention that the stock was not properly distributed. The words “as a reward for management” were intended to be given effect—otherwise they would not have been used. Thus it is clear that the word “and” was used disjunctively, and that the stock was properly used for the reward of management.

B. APPELLANTS’ ATTACK IGNORES THE PLAIN MEANING OF THE PLAN WITH RESPECT TO “SUCCESSFUL REHABILITATION”.

But to go further. Let us assume, for the purpose of argument only, that appellants’ contention is correct and that the distribution of the stock should have been judged

¹³⁰Tr. pp. 452; 698.

¹³¹Tr. pp. 459; 699.

¹³²Tr. pp. 460; 700.

solely by the fact of “successful rehabilitation.” Appellants make two arguments in this connection:

(1) That the determination of the fact of “successful rehabilitation” was not in the discretion of the board of directors;¹³³ or

(2) If it was, then the board’s determination of that fact was a “gross abuse of discretion.”¹³⁴

(1) The board of directors had discretion to determine whether the corporation’s affairs were successfully rehabilitated.

With respect to appellants’ contention that the board of directors had no discretion to determine whether or not the company had been successfully rehabilitated, it is sufficient to refer to the understanding of the parties when the plan of reorganization was under consideration and adopted. Appellants then stated that under the terms of the plan of reorganization the board of directors had **complete discretion** as to when the stock should be distributed. **This construction was acquiesced in by all of the parties participating in the deliberations.** The intention of the parties and the court when the plan was adopted and approved is the controlling intention, and that intention was clear. Appellants stated with respect to the provisions of the plan regarding the stock to be held by the board of directors for distribution:¹³⁵

“Furthermore, they say to give it to the Board of Directors **to give away as they please** for the successful rehabilitation of the company’s affairs. All right, what does that mean? I asked Mr. Pedder, who is attorney here, I said ‘Does that mean when it is on

¹³³Appellants’ Brief p. 54.

¹³⁴Appellants’ Brief p. 55.

¹³⁵Tr. pp. 452; 698.

a dividend paying basis? Does that mean when the debts are paid? Is that a condition?' He said 'Oh no, **that is to give away at any stage that they want to.**'

* * *

Appellants further stated:¹³⁶

"You do not modify the right of stockholders by taking out of their pockets and putting into the pockets of anybody else. Furthermore, **there is no condition upon which these people are to get this stock, at what stage of the game.**"

Again, in the proceedings before the special master the following discussion was had:¹³⁷

"The Master. In a matter of this kind has the Bankruptcy Court authority in response to a plan of this kind that is consented to by a sufficient number of stockholders, to wipe out some of the stock? I am speaking of common stock certificates. We have the right to do that.

Mr. Byrne [one of appellants' attorneys]: To make them surrender?

The Master. Yes cancel it.

Mr. Byrne. I am rather inclined to think it could be cancelled.

The Master. Why cannot the Court approve the use of it for the purpose of securing a competent management and paying the managers—instead of the money paying them by delivering stock to them?"

And, in the certificate and report of the successor special master, the effect and intent of the plan was thus expressed, at the end of the master's opinion and report:¹³⁸

¹³⁶Tr. pp. 459; 699.

¹³⁷Tr. pp. 460; 700.

¹³⁸Tr. pp. 165-166; 702.

“The herein proposed plan in effect says to the stockholders, ‘Your stock at the present time is worthless; this you concede when you admit the corporation is insolvent. Turn in all your stock. If at the end of five years the payment in full of the extended obligations has been accomplished, fifty per cent (50%) of that stock will be returned to you, the other fifty per cent (50%) is to be held free and clear of any claim, right, title or interest of yours. This latter portion of your stock, in its sole discretion, the Board of Directors will distribute, either in whole or in part, to the managing officers thereof as a reward for management and the successful rehabilitation of the company’s affairs.’ Bluntly put the proposition to the stockholders is this: You have nothing now except some worthless stock. Surrender it. Perhaps at the end of five years, if things go as planned, you will get back one-half thereof and it may be of some value. It also may be that the other half of your stock, at that time may be of like value, but in the meantime has been placed in hands other than yours for a consideration, however.

Such being the case, there is nothing strange or inequitable about such a set-up; it is not a case of taking from Peter to pay Paul. All it amounts to is a practical way of putting into effect the ancient maxim ‘* * * the labourer is worthy of his hire.’ ”

This report and conclusion was adopted and confirmed by the district court in its order confirming the plan of reorganization.¹³⁹

¹³⁹And this same intention and construction is manifested in the written arguments of appellants’ counsel and others with respect to the plan. Tr. pp. 883-912, particularly Tr. pp. 889, 908-909.

Thus it was fully understood by all parties that the directors should have complete discretion and could distribute the stock “at any stage that they wanted to.” After all, the plan of reorganization provides that the distribution by the board shall be “in its sole discretion” and we submit that that means what it says, and is not limited to a mere determination of the amount of stock that should be distributed, as appellants **now** contend, without any discretion as to whether management was being rewarded or the company’s affairs had been successfully rehabilitated.

(2) The corporation’s affairs were, in fact, “successfully rehabilitated;” and the corporation’s board of directors properly so found.

But, say appellants, if this be true then the board of directors was, in view of the facts, guilty of a “gross abuse of discretion” in determining that the affairs of the company were successfully rehabilitated.¹⁴⁰ And what is appellants’ justification for this contention? Merely their uncorroborated and unusual theory that it was the intent of the plan of reorganization to insure the continued life of the corporation as a going business for the benefit of the existing stockholders (who then had no equity),¹⁴¹ and their further theory, equally indefensible, that under the terms of the plan of reorganization the company could not be said to be “successfully rehabilitated” until **all** of the obligations covered by the plan—\$569,969.72 in principal amount, plus the interest thereon—had been paid in full out of **earnings** of the corporation

¹⁴⁰Appellants’ Brief p. 55.

¹⁴¹Appellants’ Brief p. 57.

derived from the operation of its business as a going concern.¹⁴² These theories simply invite this court to substitute appellants' tortured definition of the term "successful rehabilitation" for the definition given to that term by the district court which was familiar with all the facts surrounding its use in its own plan and decree, and to substitute its determination of facts for the facts found from the evidence by the district court.

When the plan of reorganization was adopted the company was insolvent—according to appellants' own attorneys, "absolutely busted."¹⁴³ The stockholders, including appellants, had no interests to be preserved or protected. The creditors determined to keep the corporation going. The reason for the continuance of the corporation's business was the usual reason—as the trustee advised the chief creditor:¹⁴⁴

"* * * he thought a better liquidation could be accomplished if the business could be continued to operate for a trial period of a year or two, he thought that there was a possibility that it did have a going concern value, and if it did and there was an opportunity to sell it, that could be presented to the court."

To say that the corporation was not solvent and its affairs "rehabilitated" until it had paid out of earnings every penny of its \$569,969.72 of receivership obligations, plus interest, is neither good business nor good sense. If that were the test of "rehabilitation" or solvency then

¹⁴²Appellants' Brief p. 6.

¹⁴³Tr. pp. 462; 159; 696-697.

¹⁴⁴Tr. p. 742.

there is hardly a corporation existing today which could qualify, since virtually all have outstanding obligations.

Nor are the definitions of "rehabilitation" cited by appellants consistent with their contention.¹⁴⁵ The definition from *Webster's New International Dictionary, Second Edition, Unabridged*, certainly does not support appellants' contention since it defines rehabilitation as being merely a restoration to a former state of "**solvency, efficiency, or the like.**" As we shall show, the corporation had a net worth at the time of the distribution of stock of \$335,825.33, and was thus plainly solvent. The case of *New York Title & Mortgage Co. v. Friedman*, cited by appellants, with emphasis, is not apposite because that case involved the definition of "rehabilitation" as that term is specially used in the New York Insurance Law, and in *In re Title & Mortgage Guarantee Co.* (1934), 274 N.Y.S. 270, it was shown that such definition was peculiar under the New York law. And in any event, both of these cases hold only that rehabilitation is in essence restoration to **solvency**.

The case of *In re Coleman*, cited by appellants, arose under Section 75 of the Bankruptcy Act. In another case construing this same section appellants' contention was expressly repudiated, and the court held that rehabilitation under the Bankruptcy Act does not necessarily mean payment of debts in full. *In re Anderson*, 22 F. Supp. 928, at 932, the court stated:

"To rehabilitate does not necessarily imply an ability to pay in full one's entire debt structure * * *

The farmer is in bankruptcy and the liens are worth

¹⁴⁵Appellants' Brief pp. 61-62.

no more than the value of the property to which they apply. Therefore, in interpreting the act one should not conclude that the farmer must be able to demonstrate to a certainty his ability to pay the liens in full during the three-year period in order to obtain the stay of proceedings.”

It is plain that the affairs of the corporation were rehabilitated at the time the stock was distributed by the board of directors. Indeed, the corporation was successfully rehabilitated well before the sale of its Sunnyvale plant; it was solvent and its stock had a real substantial value as early as 1939.¹⁴⁷

There is no conflict in the evidence in this regard. In major outline the evidence shows that:

(1) Whereas the company had a net worth of *minus* \$61,787.36 at the time the plan was adopted, it had a net worth of \$142,862.27 at the end of 1939, of \$206,330.87 before the sale of its plant in 1940, and of \$335,825.33 following the sale and at the time that the stock was distributed;¹⁴⁸

(2) Whereas during the twenty months prior to reorganization the company had lost some \$183,000.00,¹⁴⁹ it had under the reorganization management a net income of more than \$229,730.73.¹⁵⁰ And what is more, prior to reorganization no adequate reserves for depreciation, etc., had been taken,¹⁵¹ whereas the

¹⁴⁷Tr. pp. 838; 709.

¹⁴⁸Resp. Ex. Nos. H, F.; Tr. pp. 801-806; 849.

¹⁴⁹Resp. Ex. No. B; Plff. Ex. No. 3A.

¹⁵⁰Resp. Ex. Nos. H, F; Tr. pp. 801-6, 849.

¹⁵¹Tr. pp. 869; 435-7; 798-801.

net income figures following reorganization are taken only after full deductions for depreciation and interest;¹⁵²

(3) Whereas the company had, immediately following reorganization, outstanding obligations of \$569,969.72, the corporation had by the time of sale, under its reorganization management, paid off more than 50%, or more than \$300,000.00 upon its said debts, over and above all operating charges, including proper depreciation;¹⁵³ and had adequate current assets to meet the balance.¹⁵⁴ Appellants' attempted point that these current assets were not all in cash until after the sale is meaningless;

(4) Whereas the physical plant and properties of the corporation were, at the time of reorganization, in a "deplorable condition", they had, by the time that the stock was distributed, been brought back by the reorganization management, out of operating revenues, to a state of normal operating efficiency;¹⁵⁵ and

(5) Whereas the corporation was at the time of reorganization disorganized and of no particular value as going concern, it had by the time that the stock was distributed, been "brought back" by the reorganization management to a point where the corporation had value as a going concern, and was attractive

¹⁵²Resp. Ex. Nos. H, F. Tr. pp. 801-806, 849.

¹⁵³Resp. Ex. Nos. I, G; Tr. pp. 805-808, 849.

¹⁵⁴Resp. Ex. No. C; Plff. Ex. No. 3 F.

¹⁵⁵Tr. p. 725.

enough to interest an outside purchaser willing to purchase it at a profit to the corporation of some \$131,000.00.¹⁵⁶

In other words, the corporation which was insolvent and “absolutely busted” at the time of reorganization had, by the efforts of the reorganization management, been brought back and rehabilitated to a point where it was solvent to the extent of several hundred thousand dollars; and its stock which was worthless at the time of reorganization had acquired a substantial value. This is the plainest possible showing that the company was restored to solvency and as a going concern and had acquired a real net worth, and hence the plainest possible showing that it had been successfully rehabilitated.

After all, the directors of the company were the persons most familiar with its affairs. Not only is there a normal presumption as to the propriety of their action, but the evidence so wholeheartedly supported their action that there was no reason for the district court to substitute its judgment, and on the facts it could only concur with the judgment of the board of directors. The evidence of this restoration to solvency by the reorganization management of the corporation is uncontradicted.

Appellants’ only attempted answer is a veiled criticism of the sale of the Sunnyvale plant by the corporation. Yet there is not the slightest suggestion by appellants that the sale was not properly made and that it was not advantageous to the corporation in that it resulted in a profit

¹⁵⁶Tr. p. 860; Resp. Ex. No. F.

of some \$131,000.00 to the corporation. The sale was not attacked in the pleadings; was not an issue; and was not attacked by evidence adduced at the trial.

C. A WORD AS TO THE EQUITIES.

As we have heretofore pointed out, the purpose of reorganization under Section 77B of the Bankruptcy Act has repeatedly been held to be the promotion of a better realization of the claims of creditors than would occur through immediate liquidation, with due regard to the superiority of such claims over the rights, if any, of stockholders. In this case, since the corporation was confessedly insolvent at the time of reorganization, the old stockholders had no rights to be protected, and anything that they got out of the reorganization was a sheer “wind-fall” to them.

Here the reorganization management was so successful that not only were the creditors of the insolvent corporation paid their scaled-down claims in full—and this could not have been done at the time of reorganization—but the old stockholders, whose stock was worthless, have received \$45.00 a share upon their stock, with the prospect of receiving a still further final liquidating dividend.

The old stockholders would not have received this large liquidating dividend had it not been for the fact that in the plan of reorganization the creditors voluntarily scaled down their claims against the corporation by \$76,401.00, and further scaled down the interest thereon—and these are the same creditors whom appellants now condemn for their action in compensating the management for making payment to the creditors and stockholders possible.

In addition, both of the appellants have accepted all of the benefits of the plan of reorganization, the benefits of the decree of the district court confirming it, and the benefits of the successful reorganization management pursuant thereto. Neither of appellants objected to the sale of the corporation's plant at a profit of \$131,000.00, and both of the appellants promptly collected their \$29,367.00 share of the first liquidating dividend. Having accepted these benefits of the plan and its operation, appellants are estopped to deny and should be compelled to submit to its conditions and the conditions of the decree enforcing it.

Smith v. Missouri Pac. R. Co. (8th C.C.A., 1920),
266 Fed. 653.

In that case the court said, page 657:

“As the appellant claims to have a right of action against the appellee by virtue of the foreclosure decree solely, she cannot accept the benefits of that decree, without submitting to the conditions, upon which this privilege is granted, the right of the court, which rendered the decree, to determine the liability of the receiver, to the exclusion of every other tribunal.”

D. APPELLANTS REALLY ASK THIS COURT TO ABROGATE THE TERMS OF THE PLAN OF REORGANIZATION UNDER WHICH ALL PARTIES HAVE ACTED.

What do appellants really seek? They seek the complete nullification of the plan of reorganization. Under the plan of reorganization the creditors gave up approximately \$76,401.00 of bona fide claims against the corporation and scaled down the interest upon the balance of their claims upon condition that the stockholders should give up and contribute 50% of their ownership and stock and upon the

further express condition that provision should be made for the compensation of a competent management. If appellants are now given what they seek—the cancellation of that 50% so given up—the old stockholders will then again own 100% of the outstanding stock of the corporation; will have squeezed approximately \$100,000.00 in principal and interest out of their creditors in the process; will have deprived the management of compensation agreed upon and earned; and will have completely nullified and abrogated the plan of reorganization. In other words, the old stockholders, whose stock was junior and worthless, will have everything they ever had, and more—at the expense of the creditors and the reorganization management who gave the stock every particle of value it acquired and has. This, we submit, is not only unsupported by the evidence and the plan of reorganization but is inequitable in the extreme.

We submit that there is no uncertainty in the paragraph regarding the distribution of stock to management, and that the board of directors properly distributed the stock. If, however, it might be said that there is any ambiguity in this regard, then we submit that the proper court to clarify such uncertainty and define “successful rehabilitation” was the district court which was familiar with all the facts surrounding the use of that term in its plan of reorganization and decree. In view of the abundant evidence supporting its judgment, we submit that the district court’s determination is proper and conclusive.

V.

**THE INJUNCTIVE RELIEF GRANTED BY THE DISTRICT COURT
IS RESPONSIVE TO THE ISSUES.**

Appellants complain that the issues raised in the consolidated pleadings were so limited that the district court could only deal with and enjoin actions relating to the distribution of stock to the corporation's managing officers, and that appellants should now be free to prosecute actions in the state court "involving the propriety of bonus and cash payments" to said officers. There is no merit in this contention.

**A. THE DISTRICT COURT'S INJUNCTION IS RESPONSIVE TO THE
ISSUES RAISED BY THE PLEADINGS.**

(1) Under the pleadings, all of the compensation of the corporation's officers, both stock and cash, was in issue.

It is not true, as appellants say, that the consolidated causes "deal solely and exclusively with the propriety of the distribution to appellees Bassick, Hyland, and Levit * * * of 2212-1/2 shares of Hendy stock."¹⁵⁷ On the contrary, all of appellees' compensation, whether by way of stock or cash distribution, was in issue.

The complaint of appellant Shores expressly alleges that:

"From on or about March 26, 1936, and continuously thereafter up to on or about November 15, 1940, the above named defendants Bassick, Hyland, Levit, First Doe, Second Doe, and Third Doe were employees of Hendy Co., and as such were, during said period, fully compensated for services rendered to said corporation; * * *"¹⁵⁸

¹⁵⁷Appellants' Brief p. 63.

¹⁵⁸Tr. p. 4.

This allegation was put in issue by appellees' denial.¹⁵⁹

Similarly, in the other of the consolidated causes, the reorganization proceedings, appellees' petition pleads that the compensation of appellees Bassick, Hyland, and Levit was only partial, and was supplemented by the subsequent distributions referred to in the evidence.¹⁶⁰ These allegations were put in issue by appellants' denial.¹⁶¹

(2) Proof and judgment with respect to cash distributions were necessary to the court's determination of the propriety of the stock distribution.

Moreover, before the district court could determine whether the stock was properly distributed to the managing officers, it had first to determine what cash distributions had been made. The propriety of the "reward to management" by cash was thus an integral part of the court's determination of the propriety of the stock distribution. Indeed, both appellants and appellees introduced studies purporting to showing the cumulative result of both cash and stock distributions—considered together and as an integrated reward to management.¹⁶²

B. EVEN WERE THE DISTRICT COURT'S INJUNCTION NOT RESPONSIVE TO THE ISSUES RAISED BY THE PLEADINGS, IT IS NEVERTHELESS RESPONSIVE TO ISSUES RAISED DURING THE COURSE OF TRIAL.

Even assuming that the question of cash distributions was not raised by the pleadings—which it plainly is—it is clear that the question of the cash distributions was expressly raised by appellants during the trial, and, thus,

¹⁵⁹Tr. p. 52.

¹⁶⁰Tr. pp. 238-244.

¹⁶¹Tr. pp. 376-378.

¹⁶²Resp. Ex. No. J; Plff. Ex. No. 5.

upon an entirely separate ground, the determination and judgment of the court with respect thereto was proper. Appellants opened up the question of the salaries, bonuses, and cash paid by the corporation to its managing officers. These matters were exhaustively gone into in appellants' interrogatories and appellees' answers thereto. These were read into evidence by appellants.¹⁶³ Appellants' attorneys repeatedly referred to the cash distributions in their opening statement, and offered and elicited evidence in this regard. It is true that at the outset appellees' attorneys objected to such evidence, but the objection was overruled,¹⁶⁴ and thereafter, without objection, appellants developed, by stipulation¹⁶⁵ and otherwise, all of the salaries, bonuses, and cash distributions made to the managing officers.

Appellants now say that these facts were brought out only "for the *limited purpose* of showing that in December of 1940 the Hendy Co. could only have made cash disbursements * * * by resorting to the proceeds of sale of the capital assets of the Company."¹⁶⁶ But there is nowhere in the record any indication of this limited purpose. Without any limitation, appellants read in the answers to the interrogatories with respect to the cash distributions,¹⁶⁷ stipulated the amounts thereof,¹⁶⁸ interrogated the managing officers with respect thereto,¹⁶⁹ offered no objection to cross-examination and further inquiry along

¹⁶³Tr. pp. 553-556; 62-64; 75-89.

¹⁶⁴Tr. pp. 550-553.

¹⁶⁵Tr. pp. 557-563.

¹⁶⁶Appellants' Brief p. 68.

¹⁶⁷Tr. pp. 553-556.

¹⁶⁸Tr. pp. 557-563.

¹⁶⁹Tr. pp. 557-563.

the same line,¹⁷⁰ introduced in evidence and based accounting testimony on the annual reports of the company setting forth the details regarding such cash distributions,¹⁷¹ and introduced exhibits calculating the net effect of such cash distributions considered together with the stock distributions.¹⁷²

Thus, apart from the fact that the relief granted by the district court was responsive to the issues raised by the pleadings, the injunction was clearly responsive to the issues framed by appellants during the trial. The decree, therefore, was proper.¹⁷³

The scope of the issues is not to be judged solely by the "Shores" complaint. Injunctive relief was, after all, granted in response to appellees' petitions,¹⁷⁴ which pleaded the inadequacy of the compensation of the corporation's managing officers and prayed generally and specially for protection of the corporation's actions in carrying out the plan of reorganization.

¹⁷⁰Tr. pp. 578-579, 581-583, 627-630, 728, 733-735, 826, 833-835.

¹⁷¹Tr. pp. 709-710, 712, 817-825, 705.

¹⁷²Plff. Ex. Nos. 3, 3A, 3B, 3C, 3D, 3E, and 3F; Tr. pp. 634-649.

¹⁷³*Schmidt v. United States* (8th C.C.A. 1933), 63 F. (2d) 390, 392;

Stewart v. Crowley (1931), 213 Cal. 694, 699-700; 3 P.(2d) 562;

Starkweather v. Eddy (1927), 87 Cal. App. 92, 98; 261 P. 763.

¹⁷⁴Tr. pp. 233-249.

CONCLUSION.

We submit that the district court was clearly the proper tribunal, both in law and in logic, to interpret, effectuate, and protect its own decree and plan of reorganization; and that its judgment is supported by the evidence. The judgment is particularly compelling in this case because it was rendered by the same judge, Honorable A. F. St. Sure, before whom the reorganization proceedings were had, and by whom the decree and plan in question were made. The judgment should be affirmed.

Dated, San Francisco, California,
September 28, 1942.

Respectfully submitted,

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No. 10,085
IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

GLADYS M. SHORES and HAROLD M. F.
BEHNEMAN,

Appellants,

VS.

HENDY REALIZATION Co. (a corporation) (formerly the Joshua Hendy Iron Works), A. J. MAYMAN, C. B. MOORES, E. PRICE, A. E. WEBBER and W. R. BASSICK, individually and as the Directors of Hendy Realization Co., ELMER M. HYLAND and MORRIS LEVIT,

Appellees.

APPELLANTS' REPLY BRIEF.

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Appellees.

APPELLANTS' REPLY BRIEF.

The major contentions advanced by appellees in this appeal in support of their position that the judgment of the District Court should be affirmed may be summarized as follows: (1) That the District Court had jurisdiction over the subject matter of these consolidated proceedings; (2) that the individual appellees became proper parties to the Hendy reorganization proceeding upon the filing of their petitions of February 19th and March 11, 1941; (3) that the judgment

of the District Court was proper on the merits; and (4) that the District Court properly issued a permanent injunction restraining appellants from hereafter questioning through court action the propriety of the cash bonus payments made by the Hendy Co. to appellees Bassick, Hyland and Levit on December 4, 1940.

Appellants' contentions and arguments respecting the above matters have been set forth in their opening brief and will not be repeated here. The purpose of this brief will therefore be to analyze and reply to the arguments advanced by appellees in support of their contentions outlined above.

I.

REPLY TO APPELLEES' CONTENTION THAT THE DISTRICT COURT HAD JURISDICTION OVER THE SUBJECT MATTER OF THESE CONSOLIDATED PROCEEDINGS.

In support of this contention, appellees start with the premise "that there is complete factual identity between the subject matter (propriety of the distributions to the managing officers) of appellees' petitions in the district court and appellants' declaratory relief actions in the state court" (appellees' brief, p. 27). Appellants agree with this statement insofar as it deals with the propriety of the *stock distributions* to appellees Bassick, Hyland and Levit, but repudiate it insofar as it may refer to the *cash or bonus distributions*—this for reasons hereafter expressed in this brief.

1. **Jurisdiction of the District Court Over the Subject Matter of Appellees' Petitions of February 19th and March 11, 1941.**

Appellees' argument that the District Court, sitting as a court of bankruptcy in the original Hendy reorganization proceeding, had exclusive jurisdiction over the question of propriety of the *stock distribution* to appellees Bassick, Hyland and Levit (the subject matter of appellants' two State Court declaratory relief actions) seems to be based upon the following grounds:

(a) Because the District Court had jurisdiction in the original reorganization proceeding resulting in the Hendy Plan of Reorganization;

(b) That the Hendy Co. and its creditors are affected by these State Court actions;

(c) That the District Court had continuing, ancillary or supplemental jurisdiction to enforce its decrees in the original reorganization proceeding.

It will be remembered that, by reason of appellees' petitions of February 19th and March 11, 1941, further prosecution of appellants' State Court actions has been permanently enjoined. The propriety of this injunction, of course, depends upon the jurisdiction of the District Court over the subject matter of those actions. With this in mind, appellants reply to the three points enumerated above as follows:

(a) The jurisdiction of the District Court over the original Hendy reorganization proceeding is not under attack here. Its jurisdiction over a controversy *aris-*

ing out of the Hendy Plan of Reorganization long after the same was consummated and carried into effect, and long after the reorganization proceeding had been terminated and closed by a final decree, is definitely in question. Appellees' argument seems to be that because the District Court approved the Hendy Plan and supervised its execution, it continued to have exclusive jurisdiction over any controversy later arising out of the Plan with respect to rights established thereby, irrespective of the nature of the controversy or other jurisdictional considerations, and without regard to the fact that the reorganization proceeding had been terminated.

The absurdity of such an argument is, of course, obvious, and it is unsupported by any citation of authority in appellees' brief. If extended to its logical conclusion, such a rule of jurisdiction would lead to some very strange results. To illustrate, we suggest the following example:

A debtor in reorganization proceedings gives new notes to creditors under a plan which provides for acceleration of maturity in the event that the debtor makes a net profit in a stated amount in any year during the five years following approval of the plan. "Net profit", as a term, is not defined in the plan. The plan is confirmed, the notes are delivered, and a final decree is entered in the reorganization proceedings, without reservation of jurisdiction. Three years later, a note holder claims that debtor's "net profit" for the prior year has been such as would entitle him to immediate payment of his note. This is denied by the debtor. The note holder then wants to sue

on his note. May he bring his action in a State Court, or must he file a petition in the old reorganization proceedings? If the latter, how could the bankruptcy court render a judgment which would entitle the note holder to his money, if his contention regarding the meaning of the term "net profit" is correct?

An application of appellees' reasoning to the foregoing example would preclude the creditor from seeking to protect his rights in the State Court, and would require him to litigate his differences with the debtor only in the bankruptcy court. Appellees' reasoning would restrict the litigation of all controversies as to property rights stemming out of reorganization proceedings exclusively to the bankruptcy court, irrespective of how long subsequent to the formal closing of the proceeding the controversy might arise, and irrespective of the nature of the controversy. This is not the law. If it were, rights created by a Federal court judgment could never be made the subject of litigation in a state court (*United States, etc. v. Douglas*, 113 N. C. 190, 18 S. E. 202, 203).

We are not here presented with a case where appellants, by their State Court actions, seek to upset, question or nullify something previously determined by order of the District Court. The sole controversy presented by these consolidated cases deals with the propriety of the stock distribution by the Hendy Directors to appellees Bassick, Hyland and Levit under the circumstances developed by the evidence, as described in appellants' opening brief. This was con-

ceded by appellees' counsel at the commencement of the trial in the District Court (Tr. pp. 525, 526). A determination of this controversy depends upon whether, almost five years after the Hendy Plan was confirmed, the affairs of that company had been *successfully rehabilitated* within the meaning of the Hendy Plan. This is a question of fact to be determined in the light of circumstances occurring long subsequent to the closing of the Hendy reorganization proceeding on January 27, 1937. As we have previously pointed out, the Hendy Plan does not afford, and no order of the District Court prescribes, a definition of the term "successful rehabilitation". No circumstances under which such event would be deemed to have been accomplished are outlined in the Plan or in any order of the District Court. In other words, this is not a case where appellants are seeking to obstruct or interfere with any previously well defined order or direction of the District Court, and there accordingly exists no reason why the question in controversy cannot be determined in the State Court, where originally presented. Under the circumstances, the State Court had exclusive jurisdiction over this controversy.

(b) Appellees contend that the Hendy Co. and its creditors are interested in this controversy regarding the propriety of the stock distribution in question. They argue that appellants are "seeking to vitiate the plan of reorganization by squeezing some \$100,000 out of the Hendy creditors" (appellees' brief, p. 34), and add there that the "purpose of reorganization proceedings is to promote a better realization of claims

of creditors than would occur through immediate liquidation”.

Let us examine the facts. Under the Hendy Plan, as confirmed, the creditors agreed to a scaling down of their claims from \$644,732.27 to \$569,969.72 (Tr. p. 532). Their future rights under the Plan were thus established within well defined limits. Following the sale of the Hendy plant at Sunnyvale on November 15, 1940, the \$274,966.57 (Tr. p. 628) of those deferred obligations then remaining unpaid were fully satisfied. At this point, the creditors ceased to have any further interest in the Hendy Co. or its Plan—they had been paid in full. Regardless of what happened to the Hendy stock in controversy, i.e., whether it was distributed to the managing officers or returned to the treasury of the company, the Hendy creditors could expect no more than they had received. Therefore, to say that they were “squeezed” of \$100,000, or any other sum, is to distort or ignore the simple and uncontroverted facts. The Hendy creditors simply are not interested in, or in any way affected by, this controversy.

The Hendy Co. can in no way be adversely affected by appellants’ State Court declaratory relief actions. The relief therein sought is exclusively against the individual appellees. The corporation was joined merely as a nominal party defendant, these actions being in the nature of stockholders’ representative suits. The subject matter of the controversy presented by those actions is the Hendy stock in question—not property of the Hendy Co. The only dispute revolves

around the right of appellees Bassick, Hyland and Levit to retain that stock. This is a matter of concern to the appellee Hendy Directors, inasmuch as the propriety of their actions in distributing the stock is in question. It is also a matter of concern to appellees Bassick, Hyland and Levit, the distributees of the stock, for their right to future liquidating dividends to be declared on the stock is dependent upon their right to retain it. The old Hendy stockholders, for whose benefit the State Court actions were brought, are also vitally interested, for the disposition of future liquidating dividends is at stake. Regardless of the outcome of this litigation, the Hendy Co. will suffer no detriment, one way or the other. If appellants prevail, the stock in question will merely be retired to the treasury.

(c) Appellees argue that the District Court had ancillary jurisdiction "to enforce its decree in the reorganization proceeding" (appellees' brief, p. 37). In this connection, we assume appellees have reference to the decree of March 24, 1936, confirming the Hendy Plan and directing that it be carried into effect. To this statement they might well have added "as that decree is interpreted by appellees", for such would be consistent with their theory of jurisdiction in these consolidated proceedings. However, the answer to this argument is that the District Court in its final decree entered on January 27, 1937, found that the Hendy Plan had by that date been "fully executed, carried out, and accomplished" (see Paragraph 11 of the Final Decree, Tr. p. 229). In other words, reor-

ganization had been completed, there was nothing more to be done which required court supervision or direction, and the reorganization proceeding was accordingly, to quote the final decree, “terminated and closed; * * *” (Tr. p. 231).

To bolster their argument of continuing jurisdiction, appellees contend (1) that the court reversed jurisdiction in its order of March 24, 1936, confirming the Hendy Plan (appellees’ brief, p. 45); (2) that the final decree of January 27, 1937, restrained stockholders from instituting suits of the character of appellants’ State Court actions (appellees’ brief, pp. 42, 43); and (3) that said final decree itself contains a reservation of jurisdiction (appellees’ brief, pp. 45 to 47). Appellants reply to each of these three propositions, in their order, as follows:

(1) The reservation of jurisdiction in the March 24, 1936, order confirming the Hendy Plan was merely to empower the court to thereafter make any orders necessary to carry the Plan into effect. The Plan had been fully executed and accomplished by January 27, 1937, as stated in the final decree of that date, and the purpose of the reservation in the prior order confirming the Plan accordingly ended. In other words, the final decree superseded the order confirming the Plan and the reservation of jurisdiction contained in the latter order was accordingly terminated (see *In re Corona Radio & Television Corp.*, 102 Fed. (2d) 959 at 962).

(2) Examination of the restraining order contained in the final decree shows that creditors, claim-

ants and stockholders of the debtor corporation were enjoined from bringing suits against the debtor, the trustee, or properties of the debtor “based upon any right, claim, or interest which any such creditor, claimant, or stockholder *may have had in, to, or against the debtor*” (Tr. p. 231). This prohibition applied only to *past claims*, that is, claims which existed prior to entry of the final decree, and would not, therefore, affect actions of the nature of appellants’ State Court actions, which present a controversy which did not arise until distribution of the stock in question on December 20, 1940. Furthermore, this controversy affects neither the Hendy Co. nor any of its property, as previously pointed out.

(3) Appellees’ argument that the final decree contained a reservation of jurisdiction to deal with the controversy now before the court is indeed a novel one and is based upon a tortured interpretation of certain language contained in Paragraph 16 of the final decree (Tr. pp. 231, 232). Paragraph 16 reads as follows:

“That the proceedings for the corporate reorganization of the debtor in this court entitled ‘In the Matter of The Joshua Hendy Iron Works, a corporation, debtor, No. 25937-S’, be, and the same hereby are, terminated and closed; such termination and closing to be for all purposes final upon the filing herein of receipts showing the payment of the final fees and expenses hereinabove allowed, *and the surrender and exchange of the stock certificates which have not yet been surrendered and exchanged as provided in said plan of reorganization.*” (Italics ours.)

Appellees contend that the italicized portion of the above quoted language constitutes “a clear reservation of jurisdiction for the purpose of effectuating the entire plan of reorganization” (appellees’ brief, pp. 46, 47), and, accordingly, that jurisdiction over the controversy presented here was retained. Any such interpretation is unsound, for this language obviously refers to the surrender of shares by the old Hendy stockholders, contemplated by Paragraph 6G 2 of the Hendy Plan (Tr. pp. 186, 187), in exchange for which the stockholders received Trustees’ Receipts and Certificates to the extent of 50% of the shares so surrendered (appellants’ brief, pp. 6, 7). That *all stockholders*, including appellants, had surrendered their old shares and had received their Trustees’ Receipts and Certificates in exchange long prior to December 20, 1940, the date of distribution of the stock here in question, and long prior to commencement of appellants’ State Court actions, is conceded by appellees (appellees’ brief, pp. 6, 7), and there is no intimation that the fees allowed in the final decree were not promptly paid. The purpose of this limited reservation of jurisdiction until the stock was “*surrendered and exchanged as provided in the plan*” was thus fully accomplished, and the reservation accordingly ceased to exist long before the question presented here ever arose. After entry of a final decree in a Section 77-B reorganization proceeding, the court is without jurisdiction except as to such matters as are specifically reserved therein (*In re Argyle-Lakeshore Bldg. Corp.*, 98 Fed. (2d) 372), and the limited reservation of jurisdiction under discussion here certainly

does not constitute a general reservation of jurisdiction for all purposes. We are here concerned with the propriety of the *stock distribution* to appellees Bassick, Hyland and Levit on December 20, 1940, and that transaction involves neither a *surrender* nor an *exchange* of stock.

Appellees place great store in the argument that the controversy presented here is subject to the continuing or supplemental jurisdiction of the District Court. In doing so, they ignore certain important factors which must necessarily have a bearing on the question of whether this is a case where this type of jurisdiction can be invoked, namely, (1) the lack of a general reservation of jurisdiction in the final decree in the reorganization proceeding; (2) that no property within the court's control is involved; (3) that appellants' State Court actions do not attack or seek to nullify or interfere with any matter or thing previously determined by the District Court in the reorganization proceeding; and (4) that the parties to, and the subject matter of, the State Court actions *are not the same as in the reorganization proceeding*.

The first three points listed above have already been discussed in this brief. As to the fourth point, it is well settled that a court of equity has ancillary jurisdiction only when the *subject matter and the parties* are the same in the original and in the ancillary action (*Root v. Woolworth*, 37 L. Ed. 1123). It is equally well settled that a supplemental bill, filed after the determination of the original cause, is not ancillary. The parties to a controversy in the

Federal Court cannot, under the guise of supplemental pleadings filed after the principal controversy has been determined, vest the Federal Court with jurisdiction over parties or subject matter as to which it had no original jurisdiction (*Omaha Horse Ry. Co. v. Cable Tramway Co.*, 33 Fed. 689; Appeal dismissed, 140 U. S. 674).

The individual appellees apparently do not contend that they were ever parties to the original reorganization proceeding, so only the question of similarity of the subject matter of the original reorganization proceeding and the subject matter of the State Court actions need be considered here. The subject matter of the original reorganization proceeding was, of course, the reorganization of the Hendy Co.—the formulation of a reorganization plan. The subject matter of the State Court actions relates to the propriety of the stock distribution to appellees Bassick, Hyland and Levit, a question that obviously was not, and could not have been, before the court in the original reorganization proceeding. As previously pointed out, this question must be determined in the light of the events and circumstances occurring long after the original reorganization proceeding was finally terminated and closed, events and circumstances which by their very nature could not have been anticipated by the court when the Plan was confirmed.

In urging that the doctrine of ancillary jurisdiction is applicable here, appellees entirely ignore the authorities cited on page 37 of appellant's opening

brief and rely principally upon *Local Loan Co. v. Hunt*, 292 U. S. 234 and *In re Hermitage Bldg. Corp.*, 100 Fed. (2d) 597. Each of these cases involved an interference with, or the disregarding of, previous Federal court orders, and are readily distinguishable from the case presented here.

The *Hunt* case arises out of an ordinary proceeding in bankruptcy. Following entry of an order discharging the bankrupt from all of his debts, a creditor sued him in a State Court to enforce a prior obligation, thus disregarding the discharge. The bankrupt thereupon petitioned the bankruptcy court to enjoin further prosecution of the State Court action. An injunction was properly granted, this being a clear case where the court was justified in invoking its ancillary jurisdiction to restrain the disregard of its discharge decree.

In the *Hermitage* case the debtor corporation had been reorganized under Section 77-B of the Bankruptcy Act. Under the plan, new stock was to be issued for the old stock during the ensuing five years upon the happening of certain contingencies. A final decree was entered, under which the old stockholders were specifically enjoined from instituting court actions for issuance of the new stock until those contingencies were met. In direct violation of this injunction, appellant, an old stockholder, filed a bill in the State Court against Directors of the debtor to enforce issuance of the new stock. The Directors then moved to strike this bill upon the ground that the State Court was without jurisdiction; that ap-

pellant's remedy was in the Federal court, and that the State Court action was barred by the injunctive order in the final decree. Acting upon the motion, the State Court *directed* appellant to present the matter to the Federal District Court. Without appealing this ruling, and acting upon this direction, appellant then voluntarily *intervened* in the original reorganization proceeding. Upon a hearing of this *intervention* petition, the District Court enjoined further prosecution of the State Court action. On the appeal from this injunctive order, the Circuit Court of Appeals held that the State Court action was contrary to the injunction in the final decree.

It is obvious that neither of these cases is controlling in the situation presented here. It is also pertinent to note that both the *Hunt* and *Hermitage* cases are from the Seventh Circuit, the same circuit which decided the cases relied upon by appellants as determinative of the question of the effect of a final decree containing no general reservation of jurisdiction (see appellants' opening brief, p. 37).

In Note 83 appearing on page 27 of appellees' brief, appellees contend, briefly and without elaboration, that the question of the District Court's right to permanently enjoin the State Court action brought by appellant Behneman under Section 403 of the California Civil Code (described in appellants' opening brief, pp. 33 to 35) is *not jurisdictional*. This contention is without merit, and appellees do not attempt to justify it. In their petition of March 11, 1941 (which supplements their petition of February 19,

1941), appellees refer to this State Court action, as well as to the Shores and Behneman declaratory relief actions, alleging that, “if *said actions* are allowed to proceed irreparable injury and damage will be done” to appellees, and that “*said actions* constitute and are an unwarranted and improper attack and attempted infringement of the sole and exclusive jurisdiction of the above entitled court and its order dated March 24, 1936” (Tr. pp. 287, 288). Acting upon this petition, the District Court temporarily restrained further prosecution of this action under Section 403 of the California Civil Code, as well as the Shores and Behneman declaratory relief actions, in its order of March 11, 1941 (Tr. pp. 290, 291). Appellants’ motion to dismiss appellees’ said petitions and to vacate the temporary restraining order was made on jurisdictional grounds (Tr. p. 336), and was denied. The temporary restraining order was made permanent in the District Court’s judgment of November 15, 1941 (Tr. p. 134). Appellants’ specification of error No. II (appellants’ opening brief, p. 18) is specifically directed at the District Court’s denial of appellants’ above described motion to dismiss. These facts clearly demonstrate that the question of the District Court’s right to permanently enjoin further prosecution of the State Court action under Section 403 of the California Civil Code is wholly and entirely *jurisdictional*. In fact, insofar as this action is concerned, nothing other than jurisdiction to enjoin its further prosecution is involved, for the merits of this action were not in issue in the trial before the District Court.

2. Jurisdiction of the District Court Over the Subject Matter of the Shores and Behneman State Court Actions.

Appellees argue that inasmuch as the District Court has jurisdiction to entertain appellees' petitions of February 19th and March 11, 1941 in the reorganization proceeding, it had jurisdiction to render the judgment appealed from, regardless of whether or not the Shores action was properly removed from the State Court (appellees' brief, p. 53). This begs the question, for if, as contended by appellants, the District Court did not have jurisdiction over appellees' petitions, then the propriety of removal of the Shores action from the State to the District Court becomes highly material.

The Shores action was removed upon the sole ground that the complaint in that action presented a "Federal question" within the meaning of the removal statute (28 U. S. C. 71). As demonstrated in appellants' opening brief, a bill or complaint presents a Federal question only where the allegations thereof present a case in which the recovery depends upon the construction of a law of the United States. If the validity, construction or effect of such a law is not the subject of a bona fide dispute, then a Federal question is not present (see appellants' opening brief, pp. 45, 46).

Appellees contend that the Shores action "necessarily involves the construction of the Bankruptcy Act" (appellees' brief, p. 54). This contention is definitely unsound (appellants' opening brief, pp. 47 to 51). Appellees further urge that "the rights asserted by the parties in the Shores action are rights

arising under a law of the United States, namely, the Bankruptcy Act'' (appellees' brief, p. 55), but this argument fails for lack of any satisfactory explanation. The mere fact that the Shores action seeks to enforce property rights originating out of a reorganization plan approved under Section 77-B of the Bankruptcy Act does not make it one which arises under the Constitution or laws of the United States within the meaning of the removal statute, for no dispute or controversy respecting the validity, construction or effect of the Bankruptcy Act is presented by the Shores complaint (see cases cited appellants' opening brief, pp. 48-50; also *Metcalf v. Watertown*, 128 U. S. 586; *Pope v. Louisville Railway*, 173 U. S. 573). The fact that the Shores complaint may call upon the State Court to interpret language contained in Paragraph 6G 2 of the Hendy Plan does not present a Federal question, for the interpretation of this language does not rest exclusively with the District Court. There is no reason why a State Court cannot properly construe it (appellants' opening brief, pp. 49, 50).

There is still another reason why the propriety of the removal of the Shores action to the District Court is vitally important. The individual appellees are *all named as defendants* in the Shores action. However, although they were not parties to the original reorganization proceeding, they nevertheless saw fit to file their asserted ancillary petitions of February 19th and March 11, 1941 in that proceeding without previous application for leave to intervene. If, as appellants contend, this course was improper, and if,

as appellants likewise contend, the original Hendy reorganization proceeding was closed upon entry of the final decree on January 27, 1937, then the controversy presented here was never properly before the District Court unless the removal of the Shores action was proper.

II.

REPLY TO APPELLEES' CONTENTION THAT THEY BECAME PROPER PARTIES TO THE HENDY REORGANIZATION PROCEEDING UPON THE FILING OF THEIR PETITIONS OF FEBRUARY 19TH AND MARCH 11, 1941.

The individual appellees make no contention that they were parties to the original reorganization proceeding. They cheerfully admit that their petitions for injunctive relief of February 19th and March 11, 1941 were filed without previous application for, or order permitting, intervention. Appellants' objection to this oversight is lightly cast aside with the excuse that such an objection "obviously relates to a mere technicality and does not affect the substantial rights of the parties" (appellees' brief, p. 48). Appellees' argument seems to be that if they had taken trouble to petition for the right to intervene such petition would have been granted; that their right to intervene was absolute because their interest was based on property in the control of the court; and that their failure to follow the prescribed procedure regarding intervention did not affect the substantial rights of the parties.

The act of intervening, of course, contemplates the pendency of *existing litigation* (*Adler v. Seaman*, 266 Fed. 823), and appellants have elsewhere demonstrated that the original Hendy reorganization proceeding had ceased to exist upon entry of the final decree of January 27, 1937. If this is true, then appellees' petitions of February 19th and March 11, 1941 were original in character, were dependent upon jurisdictional grounds other than those involved in the original reorganization proceeding, and regular process should have been issued upon the filing thereof. But assuming, for the purpose of argument, that the original proceeding had not been closed when appellees filed their said petitions, they then could not escape the necessity of formal intervention in that proceeding. Rule 24 (c) of the Rules of Civil Procedure for the District Courts of the United States distinctly prescribes the procedure to be followed by a person desiring to intervene in any action. This section applies to bankruptcy proceedings (*In re Finger Lakes Land Co. Inc.*, 29 Fed. Sup. 50). It has been pointed out that in *all cases*, whether the right to intervene is conditional or unconditional, statutory or non-statutory, the person desiring to intervene must serve a motion to intervene upon all parties affected thereby. Like other motions, it must state the grounds therefor, and it must be accompanied by a pleading which sets forth the claim or defense for which intervention is sought (*Moore's Federal Procedure*, Vol. 2, p. 2367).

The prescribed procedure established by Rule 24 was admittedly not followed by appellees. Further-

more, their right to intervene, if any, was purely permissive, thus falling under subdivision (b) of the Rule, for none of the circumstances conferring an unconditional right under subdivision (a) of the Rule were present.

In arguing that appellants were not prejudiced by their failure to properly intervene, appellees rely on 28 U. S. C., Sec. 391. However, this section merely deals with the power of Federal courts to grant new trials in jury cases and can have no bearing upon the point here under discussion.

Although the point was raised before the Special Master, his report of March 28, 1941 contains no discussion or finding regarding the failure of the individual appellees to file a petition in intervention (Tr. pp. 293 to 335). One of appellants' grounds of objection in the District Court to this report was this failure to properly intervene (Tr. pp. 371, 372), but ruling on these objections was reserved by the court until after trial, and the Master's report was finally approved in the judgment appealed from, thus for the first time giving appellants a ruling on their objections (Tr. p. 133). Had the matter of appellees' right to intervene in the original reorganization proceeding been presented to the District Court in the proper way, the questions of jurisdiction involved here would have been raised at an early stage of this litigation and might have been finally determined by an appeal without the expense of a lengthy trial on the merits. Appellants have ac-

cordingly been very definitely prejudiced by the lack of a timely and proper application for intervention in the manner prescribed by Rule 24 (c).

III.

ANSWER TO APPELLEES' CONTENTION THAT THE JUDGMENT OF THE DISTRICT COURT WAS PROPER ON THE MERITS.

Appellants contend in their opening brief (p. 51), and here contend, that on the merits of this case the fundamental and only question before the court is whether or not the stock distribution to appellees Bassick, Hyland and Levit on December 20, 1940, was proper. This was conceded by appellees at the time of trial (Tr. pp. 525, 526, 552), but is denied by them on this appeal (appellees' brief, pp. 58, 59).

Distribution of the stock in question can be justified upon one ground only, namely, that the distribution was made in accordance with Paragraph 6G 2 of the Hendy Plan. This paragraph contemplates distribution to the managing officers only "*as a reward for management and the successful rehabilitation of the company's affairs*", and for no other reason. But in their brief (p. 59) appellees likewise attempt to justify this stock distribution on the additional ground that it was also made "*pursuant to repeated assurances to the managing officers in consideration of which these officers had been working for partial compensation*". Paragraph 6G 2 of the Plan does not authorize the Hendy Directors to make any such assurances. If assurances of this charac-

ter were a reason for motivating the stock distribution, and this appears to be definitely the case (see resolution of Hendy Board adopted on December 20, 1940, set forth at pp. 16 to 19 of appellees' brief; also Paragraph VI of appellees' petition of February 19, 1941, Tr. pp. 237 to 239; and also Finding of Fact XII, Tr. pp. 109, 110), then the stock distribution was definitely improper.

Appellants' position with respect to the proper interpretation to be placed on the language of Paragraph 6G 2 of the Hendy Plan, has been fully stated at pages 51 to 63 of their opening brief, and will not be supplemented here. However, with respect to appellees' argument that the affairs of the Hendy Co. had been *successfully rehabilitated* on December 20, 1940, we wish again to direct the court's attention to the fact that prior to that date all operating assets of the Hendy Co. had been sold; proceeds of this sale of capital assets had been resorted to in order to pay off balances still due the old deferred creditors; the going concern value of the company had thus been destroyed, and proceedings for the corporate dissolution of the company had been instituted. In other words, the Hendy Co. had been definitely and finally put out of business by December 20, 1940. This, we submit, was not the type of "successful rehabilitation" contemplated by Paragraph 6G 2 of the Hendy Plan.

IV.

APPELLANTS' REPLY TO APPELLEES' CONTENTION THAT THE DISTRICT COURT PROPERLY ISSUED A PERMANENT INJUNCTION RESTRAINING APPELLANTS FROM HERE-AFTER QUESTIONING THE PROPRIETY OF THE CASH BONUS PAYMENTS MADE TO APPELLEES BASSICK, HYLAND AND LEVIT ON DECEMBER 4, 1940.

In the Shores complaint only the stock distribution to appellees Bassick, Hyland and Levit is questioned—the payment of cash bonuses to these appellees is not attacked, and no relief is prayed for with respect to such payments (Tr. pp. 3 to 23). It is true that in Paragraph III of the complaint in the Shores action it is alleged that *between March 24, 1936 and November 15, 1940* appellees Bassick, Hyland and Levit, as employees of the Hendy Co., were *adequately* compensated for their services. This allegation was denied in appellees' answer to the Shores complaint (Tr. pp. 51, 52). It is also true that in Paragraph VI of appellees' petition of February 19, 1942 (Tr. pp. 237 to 239), it is alleged that the compensation paid to appellees Bassick, Hyland and Levit was not *commensurate* with the value of their services, and that this allegation was denied by appellants in their answer to this petition. An issue was thus raised as to the *adequacy* or *inadequacy* of the compensation paid to these appellees up to November 15, 1940. However, inasmuch as the *adequacy* or *inadequacy* of their compensation could not, as already pointed out, have any bearing on the propriety of a stock distribution under Paragraph 6G 2, this issue was not material to the determination of these consolidated causes.

Under none of the pleadings filed herein was any issue ever raised as to the *propriety* or *impropriety* of payment of the cash distributions made to appellees Bassick, Hyland and Levit on December 4, 1940. Appellees do not so contend in their brief, but, on the contrary, refer to “the *inadequacy* of the compensation of the corporation’s managing officers” pleaded in their petitions (appellees’ brief, p. 77). Without question, all of the evidence referred to in appellees’ brief (pp. 76, 77) dealt merely with the question of *adequacy* of the compensation paid to the management prior to sale of the Hendy plant on November 15, 1940—not with the *propriety* of payment of the cash bonuses paid on December 4, 1940. There was no evidence introduced by any party which will support the court’s finding of fact that the cash distribution of December 4, 1940 was *proper* (Finding No. XVI, Tr. p. 118), or its conclusion of law that these cash distributions were “due, reasonable, and proper and should be ratified, approved and confirmed” (Conclusion No. III, Tr. pp. 128, 129).

Whether the cash compensation paid to appellees Bassick, Hyland and Levit prior to November 15, 1940 was *adequate* is one thing—whether the bonus payments of December 4, 1940 were *proper* is something else. No issue presenting the question of *propriety* of the cash bonus payments was either raised by the pleadings or during the trial. Accordingly, the injunction contained in the judgment appealed from, restraining appellants from attacking the *propriety* of the cash and bonus distributions to appel-

lees Bassick, Hyland and Levit, (Tr. p. 135), is highly improper and should be dissolved. As pointed out in appellants' opening brief (p. 65), there is presently pending a State Court action attacking the *propriety* of the cash and bonus payments of December 4, 1940. This action was commenced only a couple of months before the trial of these consolidated causes and involves an issue which under no circumstances can be said to arise out of the Hendy reorganization proceeding or the Hendy Plan of Reorganization. If the existing permanent injunction is permitted to stand, appellants and the other stockholders of the Hendy Co. will for all time be deprived of their right to a judicial hearing and determination on the *propriety* of the December 4, 1940 bonus distributions—an issue not presented here.

CONCLUSION.

For the reasons, and under the authorities, set forth in appellants' opening brief, and in their foregoing reply brief, it is submitted that the judgment of the District Court in these consolidated causes should be reversed.

Dated, San Francisco,
October 19, 1942.

Respectfully submitted,

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